United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

201

NO. 21,432

JAMES HEMPHILL,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES DISTRICT FOR THE DISTRICT OF COLUMBIA.

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(Appointed by this Court)

QUESTIONS PRESENTED

1. Whether appellant's motion to acquit should have been granted, because there was insufficient evidence of premeditation and deliberation to warrant submission to the jury.

2. Whether the judge's charge inadequately differentiated between first degree and second degree murder.

3. Whether the prosecutor's erroneous statements to the jury in his closing argument -- that blood disappears, and that impressions cannot be made from bloody fingerprints -- require reversal because (a) the prosecutor may not "testify" to facts not introduced into evidence; (b) his "testimony" was incorrect; and (c) appellant was severely prejudiced by this testimony.

4. Whether it was improper to permit the eyewitnesses to identify appellant at the trial, in view of the highly suggestive confrontation between these witnesses and appellant in policy custody on the night of the crime.

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UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a criminal conviction, after jury trial, in the United States District Court for the District of Columbia. Leave to appeal in forma pauperis has been granted. This Court has jurisdiction under 28 U.S. C.§1291.

STATEMENT OF THE CASE

On the night of March 24, 1966, Phillip Richardson, a ten-year old boy, was murdered in his bed, and his grandmother, Mary Southerland, who was downstairs, was brutally assaulted.

The coroner testified that Phillip's death was caused by blows to the head with a blunt instrument (Tr. 127).

Defendant (appellant) was convicted after a jury trial of murder in the first degree (of Phillip Richardson) and of

assault with a dangerous weapon (upon Mary Southerland). He was sentenced to life imprisonment on the murder count, and 3 to 10 years (to run concurrently with the life sentence) on the assault count.

Defendant is 63 years old (Tr. 133). By reason of the life sentence, he will be ineligible for parole for 20 years, i.e., until he is 83 years old, 22 D.C. Code §2404.

On this appeal defendant challenges the proceedings below in three respects:

(1) His motions for acquittal on the first degree murder count on the ground that there was no evidence of premeditation and deliberation were improperly denied, and the instructions on premeditation and deliberation were insufficient.

(2) In his closing argument, the prosecutor "testified" with respect to matters not introduced into evidence. This "testimony" was incorrect, and had a material bearing on the outcome of the case.

(3) The testimony of the only two "eyewitnesses" was improperly admitted, under the standards announced in Stovall v. Denno, 388 U.S. 293 (1967).

The evidence implicating defendant consisted of three elements (1) the testimony of Mary Southerland, (2) the testimony of two "eyewitnesses", and (3) certain physical evidence.

(1) The testimony of Mary Southerland. Mary Southerland testified that on the evening of the murder she and her grandson Phillip were home alone, watching television (Tr.37). Defendant, whom she knew well, knocked on the door between 7 and 7:30 P.M. and was admitted (Tr. 36-38). After a brief conversation, it was agreed that defendant would go out to buy a bottle of wine and bring it back (Tr. 38-39). Mary Southerland contributed 25 cents to the purchase price, and the defendant left (Tr. 38-39).

Defendant returned in less than an hour with the bottle of wine (Tr. 39). Defendant and Mrs. Southerland then chatted amiably and at length (Tr. 42-44). During their conversation, Phillip went upstairs to bed (Tr. 42). There were no arguments and no harsh words (Tr. 41-44, 54-55,59). During this period, defendant drank about one-half of the bottle of wine, and Mrs. Southerland drank about a "jigger" (Tr. 40-41). Mrs. Southerland became drowsy, and suggested that she would like to go to sleep. Defendant agreed that it was time to leave, but after looking out the window he sat down and continued their conversation. He seemed reluctant to go (Tr. 44-45). About a half-hour later, Mrs. Southerland again hinted that she was tired, and defendant again went to the window. While he was

at the window, Mrs. Southerland's head dropped to her hands with drowsiness (Tr. 46-47). When she looked up, she reached for something on the coffee table in front of her, and as she was reaching she received a blow from behind on the head. She then suffered a series of blows (Tr. 47-48). She did not see her assailant (Tr. 48, 60-61), but assumes it was defendant because he was the only person in the house apart from Phillip and herself (Tr. 56,61). She fell to the floor and feigned unconsciousness (Tr. 48-49). The blows stopped, and she heard footsteps walking away (Tr. 49). She could not tell what direction they were heading, nor did she hear any footsteps on the stairs (Tr. 49,62). She dragged herself through the kitchen to the back door (Tr. 50-51), and as she reached the door she heard Phillip scream (Tr.51). She dragged herself into the backyard (she was heading for her neighbor's house) and suddenly began to be struck again (Tr. 52). Again, she did not see her assailant (Tr. 52). She passed out, and upon recovering consciousness she dragged herself to her neighbor's house (Mrs. Bone), and the police apparently arrived simultaneously (Tr. 53-54). She apparently told the police that defendant was her assailant (Tr. 118). A few minutes later, the police brought defendant into the room, and she identified

him as her assailant (Tr. 54). She then was taken to the hospital in an ambulance (Tr. 54).

(2) The testimony of the eyewitnesses

(a) Joyce Stephens. Joyce Stephens lives two doors away from Mrs. Southerland, in the corner house. She was upstairs watching TV when she heard shouting. She threw open her window and "saw Mrs. Southerland running from her house" into the backyard (Tr. 94). A man was running after her. Mrs. Southerland fell, and the man began hitting her with a hammer (Tr. 95-96). Mrs. Stephens ran downstairs, but by the time she reached her backdoor the assailant was gone, and Mrs. Southerland had reached Mrs. Bone's backdoor. Mrs. Stephens then went back upstairs. When she heard the sirens, she went outside and saw the police bringing defendant to Mrs. Bone's house. She "got a good look at him [defendant] when they brought him back" (Tr. 98-99) for he was only 4 or 5 feet away. He was dressed differently than the assailant (Tr. 99).

Mrs. Stephens did not know defendant prior to that evening (Tr. 100). Her observation of the assailant was from an upstairs window, across the length of her backyard, the width of an intervening back yard, and a portion of Mrs. Southerland's backyard (Tr. 104).

At trial, Mrs. Stephens positively identified defendant as the assailant (Tr. 95) [1]

(b) Paul McNeil. Paul McNeil's sister lives around the corner from Mrs. Southerland; in the house next door to Mrs. Stephens' corner house (Tr. 65-66). McNeil was visiting his sister that evening (Tr. 66-67). His sister had gone to bed, and he went to the backdoor to lock up before leaving for work (Tr. 67,82,86). The backdoor was a few steps below ground (Tr. 86).

While at the door, McNeil saw a man striking a woman (Tr. 67). He could not see what the object was (Tr. 67). The woman was shouting for help (Tr. 70). McNeil climbed the steps to get a closer look (Tr. 86). He watched for about 3 to 5 minutes (Tr. 89), then locked the back door, walked to the front door, and started walking to the bus stop to catch the bus to work (Tr. 71, 86-87). In order to reach the bus stop, he had to round the corner and walk past Mrs. Southerland's front door. As he approached Mrs. Southerland's house, a man came out of her front door. The man "had a hammer down beside him with his coat

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[1] There is no testimony in the record as to whether, when defendant was brought to the scene by the police, she identified him to the police as the assailant.

thrown back" (Tr. 72) and was walking down the sidewalk in McNeil's direction. McNeil stepped off the sidewalk as he came by (Tr. 72), and was about 3 or 4 steps from him (Tr. 89). McNeil could not remember anything about the man's appearance except the coat and the hammer (Tr. 73). He ascribed his inability to provide further identifying features to the fact that "I wasn't paying that much attention to him at first"(Tr. 74).

After the man had passed, McNeil continued on to his bus stop. While waiting for his bus, he saw a woman lying on the ground in Mrs. Southerland's backyard (Tr. 76). He started walking back toward his sister's house to call the ambulance and the police, and, while walking, saw the man with the hammer disappear over an embankment (Tr. 77-78).

When the police arrived, McNeil stood near the police car and ambulance in front of Mrs. Southerland's house (Tr. 78-79). He saw the ambulance men bring a child out of the house(Tr.78-79). He pointed out to the police the direction in which the man with the hammer had gone (Tr. 78). A few minutes later, the police brought the defendant to the place where McNeil was standing (Tr. 79). He was dressed differently than the man with the hammer (Tr. 79-80). The police took both McNeil and the

defendant to the police station (Tr. 80).[2/]

Both defendant and Mrs. Southerland were "strangers", whom McNeil had never met before (Tr. 80,84). McNeil could not identify Mrs. Southerland as the woman who was attacked; all he could tell was "that it was a female figure"(Tr. 84). Nor could he see what instrument was being used by the assailant (Tr. 83-84). He positively identified defendant as the assailant, however (Tr. 68-69). On cross-examination, he qualified his identification (Tr. 85):

> "Q. I asked you whether at that point at the time that you looked out of the back screen door of your sister's home and saw a male and a female figure struggling, could you identify the male figure as Mr. Hemphill.
>
> "A. Yes, I could. It is the same man. I will take that back. It was a man of the same description.
>
> "Q. Would you say that the best you could say at that point -- and I recognize from your testimony that you saw Mr. Hemphill later -- would be that you could have identified him more than that he was a stocky, male negro?

2/ McNeil was not asked whether he identified defendant at the time. It is a fair inference, however, from the fact that McNeil was asked to go to the police station, that he told the police on the spot that defendant was the assailant.

"A. No, I really couldn't see..."

* * *

"A. I stepped outside the door to get a closer look. That is why I know it was a man -- it had to be the same man."

(3) The Physical Evidence

Police Officer Arif Mosrie was the detective who responded to the police call. In examining Mrs. Southerland's house, he found a bloody handprint on the living room wall (Tr. 117). [No evidence was introduced as to whose handprint it was].

Upon being told by Mrs. Southerland that defendant was her assailant, Office Mosrie went to defendant's house and arrested him (Tr. 118). Defendant was very calm; he did not act drunk or abnormal (Tr. 119). There was no blood on his clothing, but there were "little specks of blood about his chin " (Tr. 119).

Officer Mosrie brought defendant back to Mrs. Bone's house, where Mrs. Southerland identified him as James Hemphill(Tr.120). Joyce Stephens and Paul McNeil were standing out front when they arrived (Tr. 120).

The following day, Officer Mosrie obtained a warrant to search defendant's apartment (Tr. 120). In the hall closet, he found a pair of trousers and a hammer which "had on a substance which I thought to be blood" (Tr. 121). These items were introduced into evidence (Tr. 121,122). In addition, in other parts of the house, he found a blue shirt, cap, towel, wash cloth and

white handkerchief, and "on all of those there appeared to be a substance which I thought could possibly be blood" (Tr. 122). These items, too, were introduced into evidence (Tr. 123).

[No evidence was introduced as to whether the "substance" which Private Mosrie saw was in fact blood, let alone what blood type, etc. Moreover, as indicated herein, there were no stains visible on the articles at the time of trial. No evidence was introduced to explain how or why the substance disappeared.]

Defendant's Testimony

Defendant's testimony paralleled Mrs. Southerland's through the initial visit, the purchase of the wine, his return, Phillip's going upstairs to bed, and their talk "about everything, this, that and the other"(Tr. 134-36). He testified, however, that Mrs. Southerland fell asleep at about 10 o'clock, after which he left and went home (Tr. 135, 145). When he had been home for "a pretty good while", Officer Mosrie came and arrested him (Tr. 135).

Defendant denied assaulting either Phillip or Mr. Southerland (Tr. 144-45). He pointed out that the trousers which had been introduced had no visible blood stains (Tr. 142, 147).

The Motions for Acquittal

Defense counsel moved, both at the close of the Government's case (Tr. 128) and at the close of the defendant's case (Tr. 150), for a directed verdict of acquittal on the first degree murder count. He pointed out that there was no evidence from which a jury could find premeditation and deliberation, and that, under this Court's decision in Austin v. United States, 3/ the Government was not entitled to have the first-degree murder count go to the jury (Tr. 128-29,150).

The prosecutor argued that premeditation and deliberation could be inferred from the fact that, following the assault on Mrs. Southerland, defendant had to climb the stairs to reach Phillip. "That obviously had to take more than just seconds" (Tr. 130).

The court ruled that this was "sufficient to go to the jury" (Tr. 130, 150-51). He stated that he would "respect Austin to the extent I will not charge as the judge did in that case in which the Court of Appeals criticized. In other words, I will not get down to seconds "(Tr. 151).

3/ _____ U.S. App. D. C., 382 F.2d 129 (1967).

The Closing Arguments

In his closing argument, defense counsel made much of two deficiencies in the prosecutor's case: the absence of blood from the articles introduced into evidence, and the failure to identify the bloody handprint:

> "[Officer Mosrie testified that] they had stains on them that appeared that they might have been blood. Here is the hammer. Here is ...the trousers... I have examined them. I do not see any stains visible to the naked eye. I don't see a single stain other than the ordinary dirt stains that would appear on a piece of clothing.
>
> "Here is the shirt. I doubt that this is blood on the shirt. Other than the initials, I am unable to find any foreign stain other than ordinary stains.
>
> "Was there any evidence presented that there was in fact blood on these trousers, on this shirt, on the hammer? Is there any evidence beyond the fact that an officer picked him up because he had stains that he thought might be blood? I don't see it"(Tr. 177).
>
> * * *
>
> They said they found bloody clothing. To my layman's eye, I have yet to see a piece of bloody clothing. Please feel free to look at these pieces of clothing. I cannot see where there is any blood or indication of blood"(Tr. 178).
>
> * * *

> "You have no evidence that modern criminal investigation should have... A bloody handprint on the wall. What more obvious step to take than to take the fingerprints of this defendant and compare them. This would have been direct evidence.
>
> "I don't know why, but the Government apparently prefers to leave it with you ladies and gentlemen so that you are able to speculate" (Tr. 179).

The prosecutor, in his rebuttal, decided to respond to these arguments, by giving his own "expert" explanations for the absence of blood and the absence of fingerprints:

> "He talks about fingerprints on the wall and that he can't see blood on the clothing. Of course you can't see it a year and a half later...
>
> "Ladies and gentlemen of the jury, I don't think you are going to be snowed any any argument like that " (Tr. 187-88).
>
> * * *
>
> "Now, counsel talks to you about fingerprints. Ladies and gentlemen of the jury, how are you going to get fingerprints off a wall that is smeared with blood? I ask you. Of course you can get fingerprints if you have something to take them off. But they have to dust surfaces in order to get prints. How are you going to dust a bloody wall?" (Tr. 188-89).

Standard criminology texts (cited in the argument herein) prove the prosecution to have been a misinformed"expert." Blood is ineradicable; while it changes color with the passage of time,

it never disappears. Bloody fingerprints are routinely obtained; not by dusting, but by photography.

The Court's Charge

The court's instructions on premeditation and deliberation (Tr. 203-06), which we believe were inadequate under the standards enunciated in Austin v. United States, _____U.S. App. D. C._____, 382 F.2d 129 (1967) and Belton v. United States, _____U.S. App. D. C._____,382 F.2d 150 (1967), are described fully in the argument portion of this brief.

The Jury's Findings

The jury found defendant guilty of first degree murder in the slaying of Phillip Richardson, with unanimous recommendation of life imprisonment, and of assault with a dangerous weapon upon Mary Southerland (Tr. 211-12).

STATEMENT OF POINTS

1. Defendant's motion for acquittal on the first degree murder count, at the close of the Government's evidence, should have been granted, for there was insufficient evidence of premeditation and deliberation to warrant submission of this issue to the jury.

2. The trial court's instructions to the jury with respect to premeditation and deliberation were inadequate under the standards enunciated in Austin v. United States, ___U.S. App. D.C._____, 382 F.2d 129 (1967) and Belton v. United States, ____U.S. App. D. C._____,382 F.2d 150 (1967).

3. The prosecutor, in his closing argument, "testified" about matters not in evidence. His "testimony" was incorrect. This incorrect "testimony" substantially prejudiced defendant.

4. Eyewitness testimony was admitted which was inadmissible under Stovall v. Denno, 338 U.S. 293 (1967), because the product of undue suggestiveness in the pretrial confrontation between the witnesses and defendant in policy custody.

SUMMARY OF ARGUMENT

1. Defendant's motion for acquittal on the first-degree murder count, at the close of the Government's case, should have been granted. There was absolutely no evidence of premeditation and deliberation, essential elements of the crime of murder in the first degree. No motive for the crime was shown. There had been no harsh words or argument. Indeed, the only evidence cited by the prosecutor in opposition to the motion was the fact that defendant had to climb the stairs, after assaulting Mrs. Southerland, to reach the victim, and "that obviously had to take more than seconds." Even if climbing the stairs did take more than seconds -- an assumption which is hardly self-evident -- that act alone is not sufficient to warrant submission of the issue to the jury. The issue is not whether there was time to premeditate and deliberate, but whether such premeditation and deliberation actually occurred. "The 'appreciable time' element is subordinate, necessary for but not sufficient to establish deliberation." Austin v. United States, _____U.S. App. D. C. _____, 382 F.2d 129 (1967).

2. Even if this Court holds that "climbing the stairs" was sufficient evidence to warrant submission of the first degree murder issue to the jury, it must reverse the conviction on

that count because the jury was inadequately instructed. Although defense counsel brought Austin to the court's attention, the court did not explain the "cold blood vs. impulsive killing" distinction, as Austin indicated he should. See also Belton v. United States, _____U.S. App. D. C. _____382 F.2d 150(1967). Moreover, the instructions actually given inadequately explained the difference between first and second degree murder, and thus were insufficient to check the inevitable motivation for the jury to punish a particularly brutal crime with the maximum sanction available. Cf. Austin.

3. Defendant's conviction on all other counts must be reversed and remanded for a new trial, because of prejudicial errors which occurred. The only physical evidence linking defendant to the crime were a hammer and clothing found in his closet which, Officer Mosrie testified, had a substance on them which looked like Hood. These items were introduced into evidence at trial, but there was no blood visible on them. No expert testimony was given indicating whether the substance really was blood, or explaining how, if it was blood, it could have disappeared. In his closing argument, defense counsel pointed to the absence of blood and urged the jury to disregard these items as proof of guilt. In rebuttal, the prosecutor

"testified" that blood disappears over the period of time (one and-a-half years) between the recovery of the items and the trial.

The prosecutor was wrong. Standard criminology texts recite that blood is ineradicable, and remains visible for many years. But even if he had been correct, the prosecutor had no right to "testify" in his closing argument.

The prosecutor's statement clearly and substantially prejudiced defendant. But for this statement, the jury might have concluded that the hammer and clothes had not been bloody, and dismissed them as evidence of guilt. Without these items, the prosecutor's case, while sufficient to go to the jury, was hardly overwhelming. Mrs. Southerland did not see her assailant, and her assumption that it must have been defendant is valid only if she did not fall asleep shortly before the attack. But she admitted that her head had fallen into her hands, and the jury could well have believed defendant's version that she fell asleep and he left. The two "eye witnesses" were far from the scene, admitted that defendant when arrested was dressed differently than the assailant, and (as defense counsel forcefully drove home in his summation) they were the victims of suggestion, for defendant was paraded before them in police

custody shortly after the crime. Thus, but for the prosecutor's improper and incorrect statement, the jury might have concluded that defendant was not the assailant.

4. The convictions must be reversed for still another reason: the eyewitness testimony was improperly admitted, in violation of Stovall v. Denno, 388 U.S. 239 (1967). In Stovall, the Supreme Court recognized the extraordinary suggestiveness inherent in parading before "eyewitnesses" a suspect in police custody. "It is hard to imagine a situation more clearly conveying to the witness that the one presented is believed guilty by the police." In order to minimize the dangers of miscarriages of justice resulting from such highly-suggestive confrontations, the court ruled that single-suspect confrontations (as distinguished from line-up confrontations) were permissible only where "imperative" (e.g., as in Stovall, where the victim was thought to be dying).

In the present case, it was not "imperative" that Mrs. Stephens and McNeil see defendant alone in policy custody. And, in view of their restricted opportunities to view the crime and the fact that defendant was a stranger to them, the likelihood of prejudice from this confrontation was very great indeed. Accordingly, under Stovall, their eyewitness identifications were inadmissible.

ARGUMENT

I. DEFENDANT WAS IMPROPERLY CONVICTED OF FIRST DEGREE MURDER

A. The Government Failed to Prove Premeditation or Deliberation. Defendant's Motion for Acquittal of First Degree Murder, at the Close of the Government's Case, should Have Been Granted.

"A motion for acquittal must be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime." Austin v. United States, _____U. S. App. D. C. _____. 382 F.2d 129, 138 (1967). "Deliberation and premeditation are necessary elements of first degree murder." Fischer v. U.S., 328 U.S. 463, 464-65 (1946). Defendant moved for acquittal of the first degree murder charge at the close of the Government's case, on the ground that the Government had introduced insufficient evidence of premeditation and deliberation to warrant submission to the jury. If defendant was correct, and we show herein that he was, this Court must reverse the conviction of first degree murder and direct an acquittal on that count. Austin, supra.

In ruling on this issue, this Court must "consider...the evidence as it stood at the conclusion of the Government's case." Austin, supra, at p. 138. Defendant, by introducing evidence in

his defense thereafter, did not "waive" his earlier motion for acquittal, and such evidence cannot be considered in deciding whether the motion to acquit should have been granted.[4/] Austin, supra, at p. 138; Cephus v. United States, 117 U. S. App. D. C. 15, 324 F.2d 893 (1963); Crawford v. United States, 126 U.S. App. D. C. 156, 375 F.2d 332, 334 (1967).

Premeditation and deliberation are the elements which distinguish first degree from second degree murder. In Bullock v. United States, 74 App. D. C. 220, 221, 122 F.2d 213, 214 (1941), this Court explained their importance:

> "At common law there were no degrees of murder. If the accused had no overwhelming provocation to kill, he was equally guilty whether he carried out his murderous intent at once or after mature reflection. Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than impulsive murder. The deliberate killer is guilty of first degree murder; the impulse killer is not," (Emphasis supplied).

4/ We do not mean to suggest that defendant introduced evidence which would show premeditation and deliberation.

In Austin, supra, this Court elaborated at great length the difference between first and second degree murder;

> "[F]irst degree murder, with its requirement of premeditation and deliberation, covers calculated and planned killings, while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second degree.
>
> "In homespun terminology, intentional murder is in the first degree if committed in cold blood, and is in the second degree if committed on impulse or in the sudden heat of passion.
>
> * * *
>
> "[M]any murders most brutish and bestial are committed in a consuming frenzy or heat of passion, and ... these are in law only murder in the second degree." (382 F.2 d at 137, 139; emphasis supplied).

Decisions of this Court in specific cases exemplify and give content to the terms "premeditation and deliberation." In Belton v. United States, _____U.S. App. D. C. _____, 382 F.2d 150 (1967), this Court held that the trial judge properly denied a motion to acquit, because the prosecution had proved that defendant and the victim fought "most of the time"(382 F.2d at 151); that they had had a disagreement on the day of the crime(id at 152); and that defendant "entered the apartment [where the crime was committed] with a loaded gun" (ibid). This evidence "permitted an inference that appellant arrived on the scene already possessed of a calmly planned and calculated intent to kill(ibid).

By contrast, this Court held in Austin that the motion to acquit was improperly denied:

> "That appellant used a knife to accomplish the murder is not probative of premeditation and deliberation because he did not procure it specifically for that purpose but rather carried it about with him as a matter of course...The violence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy. That there was a half-hour period ...during which appellant had ample time to premeditate and deliberate is not evidence that appellant actually did cogitate and mull over the intent to kill. Finally, the Government was not able to show any motive for the crime or any prior threats between appellant and deceased which might support an inference of premeditation and deliberation. Thus the jury could only speculate and surmise, without any basis in the testimony or evidence, that appellant acted with premeditation and deliberation. The office of the motion for acquittal is precisely to avoid such improper and unfounded conjecture"(382 F.2d at 139).[5]

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[5] See also, to the same effect, McAffee v. United States, 70 U.S. App. D. C. 142, 105 F.2d 21 (1939), holding that acquittal on the first degree murder count would be required if the only evidence was that the defendant bludgeoned the victim to death with a furnace shaker and thereafter cleaned it. "So far as the character of the blows and the weapon are concerned, they are as consistent with a killing without deliberation and premeditation as they are with a killing with those elements present. So far as the washing of the furnace shaker is concerned, that is as consistent with a desire to conceal a lesser crime as it is with a desire to conceal the crime of first degree murder." 105 F.2d at 28.

In the present case, the Government's evidence, "viewed in the light most favorable to the Government", shows that defendant and Mrs. Southerland had been friends for many years; they had chatted amicably, and without a single harsh word, for at least two hours; without the slightest provocation, defendant suddenly commenced a savage clobbering of Mrs. Southerland with a hammer; immediately thereafter, he went upstairs and clobbered Mrs. Southerland's grandson to death in his bed; he then returned downstairs and clobbered Mrs. Southerland some more; he went home and changed his clothes and tried to wash the blood off; and he was calm when the policeman arrived to meet him several minutes later.

Here, as in Austin, "the Government was not able to show any motive for the crime or any prior threats or quarrels between appellant and deceased [Phillip] which might support an inference of premeditation and deliberation." Indeed, the Government does not even contend that the assault on Mrs. Southerland was premeditated or deliberate. Its sole contention with respect to the deceased [Phillip, given in response to the motion to acquit, was as follows (Tr. 130):

"THE COURT: What do you have on premeditation and deliberation?

"MR. COLLINS: The fact that he walked up the stairs. He had to walk up the stairs after he attacked her [Mrs. Southerland] and he had to have this blunt instrument in his hand. That obviously had to take more than just seconds.

"THE COURT: I think it is sufficient to go to the jury."

Manifestly, this evidence was insufficient to go to the jury under this Court's decisions. Even if it took "more than just seconds" to climb the stairs -- a doubtful premise -- this shows only that there was time to premeditate and deliberate, not that such premeditation and deliberation actually occurred. In Austin, defendant had half an hour, but this was "not evidence that appellant did cogitate and mull over the intent to kill" (382 F.2d at 139). "[T]he crux of the issue of premeditation and deliberation is not the time involved but whether defendant did engage in the process of reflection and meditation ", Austin, supra, at p. 136. See also, cases cited in Austin, at p. 136, n. 14. "The 'appreciable time' element is subordinate, necessary for but not sufficient to establish deliberation," ibid. See also cases cited in Austin at p. 136, n. 16.

At best, the Government's evidence here shows no "calculated plan to kill", but only "an impulsive and senseless, albeit sustained, frenzy" (Austin, at p. 139), during which defendant

successively beat Mrs. Southerland, killed Phillip, and again beat Mrs. Southerland. The jury "could only speculate and surmise, without any basis in the testimony or evidence, that appellant acted with premeditation and deliberation" (ibid). Accordingly, it was error to deny defendant's motion to acquit.[6/]

B. The Court's Charge on Premeditation and Deliberation Was Grossly Inadequate

In Part A, we have shown that the trial court should have granted the motion to acquit for lack of evidence of premeditation and deliberation sufficient to go to the jury. If we are correct, this Court must reverse, and need not pass upon the

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6/ Two other items of evidence deserve passing mention, although not relied upon by the prosecution in his opposition to the motion to acquit. First, the fact that defendant may subsequently have changed his clothes and attempted to wash away the blood is no evidence that the crime itself was premeditated or deliberate. McAffee, supra n. 5 ; Austin, 382 F.2d at 139-40. Second, the hammer provides no basis for inferring premeditation. There is absolutely no evidence that defendant brought the hammer to Mrs. Southerland's house; for aught the record shows, the hammer might have been lying about her living room. Moreover, a hammer, unlike the loaded gun in Belton, is not an instrument designed solely to injure. Defendant was by trade a carpenter's helper (Tr. 144), and his carrying about of a hammer (if he did) would be no more portentous than the pocket knife carried by the defendant in Austin.

sufficiency of the charge. If, however, this Court concludes that the evidence was sufficient to go to the jury, it must decide whether defendant is entitled to a new trial because of deficiencies in the on premeditation and deliberation.

The court's charge was a model of what this Court decried in Belton and Austin, although the court was aware of this Court's Austin decision (Tr. 150):

> "I will respect Austin to the extent I will not charge as the judge did in that case in which the Court of Appeals criticized. In other words, I will not get down to seconds."

To be sure, the specific reference to "seconds" which this Coutt condemned in Austin, 382 F.2d at 136-37, was omitted. But the charge contained "no straightforward explanation to the jury of the difference between the two degrees of murder [that first degree murder ...covers calculated and planned killings, while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second degree" (id.at 137). Moreover, its definition of second degree murder was so technical and complex that nobody, including a trained logician, could possibly have comprehended it. Finally, it made no reference to the relevance of the fact that defendant had consumed half a bottle of wine, although the

Supreme Court has stated that "the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury," Hopt v. People, 104 U.S. 631, 634 (1882).

The trial court's entire definition of premeditation and deliberation was in the following sparse terms (Tr. 203):

> "As to the fourth element of first degree murder, that the defendant acted with premeditation and deliberation, premeditation is the formation of the intent or plan to kill, the formation of a positive design to kill.
>
> "Deliberation means further thought upon this plan or design to kill. It must have been considered by him, the defendant.
>
> "It is your duty to determine from the facts and circumstances of this case that you may find surrounding this killing, whether reflection and circumstances amounting to deliberation occurred.
>
> "If so, even though it be of exceedingly brief duration, that is sufficient because it is the fact of deliberation rather than the length of time that is important. Although some appreciable period of time must have elapsed during which the defendant deliberated in order for this element to be established, no particular length of time is necessary for deliberation.
>
> "It is for you, the jury, to determine if the time was sufficient to permit premeditation and deliberation."

Manifestly, this definition afforded the jury no insight into the difference between first and second degree murder. And the confusion must surely have been compounded by the charge on second degree murder (Tr. 204-06):

> "if you find the Government has not proved beyond a reasonable doubt each of the essential elements of first degree murder, you may then consider whether the Government has proved beyond a reasonable doubt the essential elements of murder in the second degree which is what we refer to as a lesser included offense.
>
> "Murder in the second degree differs from murder in the first degree in that it may be committed without purpose or intent to kill or it may be committed with purpose or intent to kill but without premeditation and deliberation.
>
> "A killing under the influence of passion induced by insufficient provocation may be murder in the second degree. An accidental or unintentional killing constitutes murder in the second degree if it is accompanied by malice.
>
> "Consequently, if you find the defendant killed the deceased with malice, bearing in mind the definition of malice which I have given you that it is a general state of mind of the kind I have defined, and that he did so without purpose or intent to kill or it committed with purpose or intent to kill then without premeditation and deliberation, you may find the defendant guilty of murder in the second degree.
>
> "Even if there is a reasonable doubt in your minds as to whether there was a purpose and

> intent to kill, or whether there was any premeditation or deliberation, you may find the defendant guilty of murder in the second degree rather than murder in the first degree.
>
> "Let me summarize the difference between murder in the first degree and murder in the second degree. Murder in the first degree is a murder committed with malice with the purpose and intent to kill and after deliberation and premeditation.
>
> "Murder in the second degree is murder committed with malice but without purpose or intent to kill or with purpose and intent to kill then without premeditation and deliberation. If there is no purpose or intent to kill or if there is a purpose and intent to kill but no premeditation or deliberation, then the unlawful killing, if committed with malice, constitutes murder in the second degree rather than murder in the first degree.
>
> "If you find the Government has proved beyond a reasonable doubt each of the essential elements of murder in the second degree and you find the Government has failed to prove each of the essential elements of murder in the first degree, then you may find him guilty of murder in the second degree."

Mr. Justice Frankfurter's remarks, dissenting in Fischer v. United States, 328 U.S. 463, 486 (1946), seem particularly apposite here:

> "As I have already indicated, I do not believe that the facts warrant a finding of premeditation. But, in any event, the

> justification for finding first-degree murder premeditation was so tenuous that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon...What the jury got was devoid fo clear guidance and illumination. Inadequate direction to a jury may be as fatal as misdirection."

The danger that an insufficiently-directed jury would veer toward a first degree murder finding was particularly great here, for the defendant was charged with the brutal slaying of a 10-year old boy asleep in his bed. As this Court recognized in Austin, 382 F.2d at 138-39:

> "The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder 'in the first degree.' But it is the task and conscience of a judge to transcend emotional analysis with reflective analysis."

In Belton, supra, decided the same day as Austin,this Court declared that "On request, an accused is entitled to instructions that make clear the distinction between the first and second degress of murder by reference to the distinction between killins in cold blood and killings on impulse" 382 F.2d at 153. In Belton,where no such request had been made, the court affirmed, for "The instructions given here were skimpy, but they did set forth the difference between the degrees of

murder sufficiently so that we cannot say reversal is required on the ground of plain error, notwithstanding the absence of objection," ibid.

Here defendant's court-appointed trial counsel did not specifically request the "killings in cold blood" vs. "killings on impulse" charge, nor did he object to the charge as given. We submit, however, that here, unlike Belton, reversal is required for three reasons:

(1) Defense counsel did call Austin to the trial judge's attention during the discussion of proposed instructions, and elicited a response that the judge would "respect Austin to the extent ...I will not get down to seconds" (Tr. 150-51). Counsel may have concluded that, in light of this response, further objection was unnecessary or would be unavailing./ In any event,

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/ Indeed, counsel may have been misled into thinking the court would give the whole Austin charge, for the court's full response was: "I will respect Austin to the extent I will not charge as the judge did in that case in which the Court of Appeals criticized. In other words, I will not get down to seconds." Since this Court in Austin criticized the absence of a"cold blood-impulse" distinction, the first sentence of this response may have led counsel to believe he would get the whole Austin charge.

counsel's calling Austin to the trial court's attention in advance of the charge served the same purpose as an objection: the court was not inadvertently overlooking something because of a failure to object.

(2) The charge here was more confusing than that in Belton, because of the unduly prolix and technical definition of second degree murder. Accordingly, we do not think it is true here that the instructions "set forth the difference between the degrees of murder sufficiently."

(3) Finally, it must be recognized that the trial judge in Belton could not have anticipated this Court's desire for a clearer delineation, and the absence of "notice" undoubtedly made this Court reluctant to reverse. But the opinion in Belton hinted that this Court might look differently upon subsequent charges which omitted the "cold blood-impulse" distinction, even absent objection:

> "We further assume that the trial judges will implement the principles set forth today, in Austin, not in a spirit of grudging acquiescence under the spur of objections, but in a wholehearted effort to improve the administration of criminal justice by illuminating for juries these matters hitherto often relegated to over-generalized and abstruse recitals" (382 F.2d at 153).

For the foregoing reasons this Court, if it does not direct acquittal, should order a new trial in which the jury receives adequate instructions on premeditation and deliberation.

II. THE PROSECUTOR'S "EXPERT TESTIMONY" IN HIS CLOSING ARGUMENT REQUIRES REVERSAL

In Part I(A), we showed that defendant is entitled to acquittal of first degree murder. We need not discuss the thorny question of what disposition would be appropriate were this the only error, cf. Austin, supra, 382 F.2d at 140-43, for, as we now show, defendant is entitled to a new trial on the remaining counts.

A.. The Prosecutor's Testimony Was Improper and, Moreover, Incorrect

In his closing argument, defense counsel pointed to the extraordinary paucity of "real" evidence introduced by the prosecutor. "You have no evidence that modern criminal investigation should have" (Tr. 179).

Counsel's comment was entirely justified. It seems highly prejudicial for a police officer to testify that a hammer and clothing found in the defendant's apartment "had on a substance which I thought to be blood" (Tr. 121) or a "substance which I thought could possibly be blood" (Tr. 122). The F.B.I. routinely determines whether in fact substances are blood. There are many stains which look like blood, but are not. A simple chemical test will verify whether a stain is blood. Morrish, Police and Crime Detection Today, p. 122 (Oxford Press, 1955). Although not indicated at the trial, defendant's hammer was sent by the police officer to the F.B.I. lab. [7] Presumably

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[7] Bottom of next page

the F.B.I. determined (a) whether there was blood; (b) if so, whether it was human blood[8]; and (c) if so, whether it corresponded in type and factor to that of Phillip and/or Mrs. Southerland. With this precise information available, the Government should not be permitted to rely on the speculations of a police officer that a substance "looked like" blood. We believe a rule akin to the "best evidence" rule in civil cases should control the Government's presentation of physical facts linking a defendant to a crime.

In any event, no such evidence was introduced here. Instead, the Government relied solely on Officer Mosrie's speculation, and on the hammer and clothing which were introduced into evidence. But, at trial, no blood stains were visible on the hammer and clothing. Not surprisingly, defense counsel made much of this in his closing argument. The prosecutor had introduced no testimony to indicate how, if there had been blood visible the day after the crime, it could have disappeared by the time of trial. The prosecutor was sufficiently concerned that he felt a need to rebut the implications of the absence of

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7/ Officer Mosrie is quoted, in "Record of Proceedings in Criminal Cases", dated April 5, 1966, as follows: "[A] hammer was recovered and it had what appeared to be blood stains and said hammer is now in the F.B.I. laboratory."

8/ Defendant testified that he had been killing hogs on his son's farm, and that if there was blood on his hammer it was hogs' blood (Tr. 141).

blood. And so he told the jury:

> "Of course you can't see it [blood] a year and a half later. Don't forget, when Officer Mosrie recovered those items, it was the next day. It wasn't two days later...But a year and a half later, counsel argues to you that he can't see any blood on the clothing.
>
> "Ladies and gentlemen of the jury, I don't think you are going to be snowed by an argument like that". (Tr. 187-88).

It would have been reversible error for the prosecutor to deliver this "expert testimony" in his closing argument even if it were correct. The fact is, however, that his assertion that blood disappears after a year and a half is refuted by the standard criminology texts. Blood stains are "ineradicable". Morrish, Police and Crime Detection Today, p. 22 (Oxford Press, 1955). Cf., Shakespeare, Macbeth, Act V Scene I,. ("out damned spot, etc.") They change color with age: recent stains will appear red, older stains light brown, and "very old stains" dull brown. Nickalls, The Scientific Investigation of Crime, p. 194 (Butterworth & Co., 1955). Nickalls discusses blood stains which are several years old. Id. at p. 195.

A similar incident occurred with respect to the "bloody handprint" which Officer Mosrie testified he found on Mrs. Southerland's living-room wall. Again, we think such testimony should be inadmissible unless accompanied by testimony

as to whose handprint it was. As it was, defense counsel had to negate the impact of a bloody handprint which never was tied to defendant. Quite properly, he pointed out to the jury that it was curious that the Government had not come forward and shown whose print it was. Again, the prosecutor felt obliged to testify:

> "Ladies and gentlemen of the jury, how are you going to get fingerprints off a wall that is smeared with blood? I ask you. Of course, you can get fingerprints if you have something to take them off. But they have to dust surfaces in order to get prints. How are you going to dust a bloody wall?" (Tr. 188-89)

Again, the prosecutor is refuted by the criminology texts. "Blood lends itself admirably to the production of neat and distinct impressions..." Gross, Criminal Investigation (3rd. Ed.), p. 390 (Sweet & Maxwell, 1934). Prints are obtained not by dusting, but by photography. Morrish, supra, pp. 86, 93, 94; Gross, Criminal Investigation (4th Ed.), p. 81 (Sweet & Maxwell, 1949); O'Hara & Osterburg, An Introduction to Criminalistics, (MacMillan Co., 1949).

That the prosecutor's "testimony" was false compounds the error, but it would have been error for him to "testify" in his closing argument, even if correctly. "It is elementary... that counsel may not premise arguments on evidence which has not been admitted", Johnson v U.S., 121 U.S. App. D.C. 19,

348 F.2d 803, 805 (1965). As the Ninth Circuit explained in Taliaferro v U.S., 47 F.2d 699, 701 (9th Cir., 1931):

> "Counsel are allowed great latitude in argument, but they should refrain from making statements of fact based solely on their own knowledge. Prosecuting attorneys occupy a very high and responsible position. It is their duty, of course, to represent the government and to present the government's contentions, but is equally their duty to see that one accused of crime is not prejudiced by the offer or introduction of incompetent evidence or by statements in argument not justified by the facts proved. Conviction must be, if at all, on the evidence given, not on what might have been given." 9/

The reasons for prohibiting "testimony" by the prosecutor in his closing argument are several, and obvious. In the first place, such a procedure denies the defendant his rights of cross-examination and rebuttal. Lowdon v U.S., 149 F. 673, 676 (5th Cir.):

9/ The prosecutor's dilemma in Taliaferro was similar to that of the prosecutor here. Defendant was being prosecuted for liquor-running. An F.B.I. agent testified that he had obtained liquor from the floor of defendant's car. Several defense witnesses testified that this was impossible, because they had observed cracks in the floor-boards through which any liquor would have escaped. In his closing argument, the prosecutor relied not (as here) on expert testimony about the characteristics of liquors, but rather on the fact, which he recited, that the cracks had been inserted in the floor-boards by F.B.I. agents subsequent to their obtaining the liquor. 47 F.2d at 699.

> "Cases are to be decided by juries upon the evidence, and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issues that are not in evidence; nor can he assume in argument that such facts are in the case when they are not".

This same consideration led this Court to reverse a conviction because a weather report was submitted to the jury after the evidence was closed. Washington v U.S., ____U.S. App. D.C. _____, 379 F.2d 166, 168 (1967):

> "We may assume, without deciding, that the weather report would have been admissible during trial as relevant...
>
> * * *
>
> "The defendant had no practical opportunity to refute the implications of the report or to set it in perspective. If the report had been part of the government's case in chief, the defendant might well have attempted to show special conditions...Or he might have tried to minimize the report's significance... With the jury already out, such tactics were effectively precluded".

Another reason why prosectors may not "testify" in their closing arguments is that they are not under oath. The defendant has a "right to a trial given under oath from the

witness stand rather than given in effect by the prosecutor from counsel table." Belton v U.S., ___U.S. App. D.C.____, 259 F.2d 811, 814 (en banc, 1958).

Still another reason is that juries are likely to give particular credit to the statements of the prosecutor, because of his "dual" status as prosecutor and protector of justice. As the Supreme Court explained in Berger v U.S., 295 U.S. 78, 88 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done...
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

See also, to the same effect, U.S. v Spangelet, 258 F.2d 338, 342 (2d Cir. 1958); Reichert v U.S. ___U.S. App. D.C. ____, 359 F.2d 278, 282 (1966).

In the cases above-cited, reversals were decreed even though the prosecutor's "testimony" might have been correct.

Here, as we have already shown, the "testimony" was false, thus compounding the injury to defendant. Cf. Evans v U.S., 98 U.S. App. D.C. 122, 232 F.2d 379 (1956). And, finally, it should be noted that only an "expert" could have qualified to supply such evidence; the prosecutor could not have, even if willing to take the stand. Cf. Johnson v U.S., supra: "Based as they are on inadmissible evidence, such comments are not permissible." 347 F.2d at 806.

For all of the foregoing reasons, it was improper for the prosecutor to "testify" as he did. We now show that that "testimony" substantially prejudiced the defendant, and warrants invocation of the "plain error" rule to reverse his convictions.

B. The Prosecutor's "Testimony" Severely Prejudiced Defendant, and was "Plain Error"

The prosecutor's "testimony", particularly his statement that blood disappears, severely prejudiced defendant. The allegedly "bloody" clothing and hammer were the only physical links between defendant and the crime. But for the prosecutor's improper comment, the jury might well have concluded that defendant's clothing and hammer had not been bloody, and discarded these as evidence of defendant's guilt. Had they done so, there is no certainty that they would have convicted.

Mrs. Southerland did not see her assailant; her assumption that it must have been defendant was persuasive only if the jury believed that she did not fall asleep prior to the assault. But by her own testimony her head had slumped forward into her hands from drowsiness (Tr. 47), and the jury might well have believed defendant, whose version of the facts coincided with Mrs. Southerland's up to that point, that Mrs. Southerland fell asleep and he left (Tr. 135). The only other testimony implicating defendant - that of the two eyewitnesses - was hardly compelling. Mrs. Stephens never got closer than 40 feet from the scene of the assault; it was late at night; she admitted that the assailant was dressed differently from defendant when the police brought him to the scene of the crime a few minutes later; and, as defendant's trial counsel forcefully drove home to the jury (Tr. 174), her observation of defendant in police custody a few minutes after the crime was highly suggestive and weakens the force of her identification. [10] Likewise, McNeil's identification was weakened by his equivocation on cross-examination; he was unable to identify

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[10] Indeed, it was so suggestive that, as we demonstrate in Part III herein, the identifications by Mrs. Stephens and McNeil were both inadmissible under the rule enunciated in Stovall v Denno, 388 U.S. 293 (1967).

the assailant other than by his coat and hammer, both of which were absent when defendant appeared in police custody; he could not identify Mrs. Southerland as the victim; he was embarrassed at trial by his cavalier attitude while the crime was being committed, and the jury might well have perceived an excessive desire on his part to "cooperate" in the identification to repent for his earlier behavior; and, finally, he too was subjected to the highly suggestive observation of defendant in police custody shortly after the crime. In addition, the jury may well have been puzzled by the discrepancy between Mrs. Southerland's testimony (that she crawled into the back yard, Tr. 51-52), and Mrs. Stephens' (that she saw Mrs. Southerland "running" into the back yard, Tr. 94).

We do not mean to suggest that this evidence was insufficient to go to the jury. We do suggest, however, that it is far from certain that the jury would have convicted if it had believed that defendant's clothes and hammer had not been bloody. Since the prosecutor improperly supplied erroneous evidence calculated to persuade the jury that the clothes and hammer indeed had been bloody, defendant was severely prejudiced.

Defendant's court-appointed trial counsel interposed no objection to the prosecutor's "testimony", but we submit that reversal is nevertheless required under the "plain error" rule.

In the first place, counsel may not have realized the seriousness of the damage being done to his client. Defense counsel was no more an "expert" than the prosecutor, and he may not have known that blood is ineradicable. Absent that knowledge, he could not have assessed the magnitude of the prosecutor's sin.

In the second place, an objection could not have cured the error. An order by the judge that the jury ignore the prosecutor's statement could not have erased the impact of his words. The damage was done, and the only appropriate action would have been to declare a mistrial. Cf. United States v Georga, 210 F.2d 45, 47 (3rd Cir., 1954) where, although the judge admonished the jury to disregard improper remarks by the prosecutor in his closing argument, the court of appeals ordered a new trial: "In spite of the very clear admonition which the trial judge gave the jury we think that these remarks are not the kind that jurors could 'put out of their minds' simply by being told to do so". See also, to the same effect, Government of Virgin Islands v Oliver, 360 F.2d 297 (3rd Cir., 1966); Ippolito v United States, 108 F.2d 668 (6th Cir., 1940). The reason for insisting upon timely objections is to permit the trial judge to correct the

error, thereby avoiding the necessity for a new trial;. United States v Grosso, 358 F.2d 154, 158 (3rd Cir., 1966). Where, as here, a new trial would have been required even if objection had been made, this Court should be more lenient in its application of the "plain error" rule.

Finally, we think it clear that the prosecutor's false "testimony" was "plain error...affecting substantial rights", and thus warrants the attention of this Court. This was a situation in which "the trial judge should have stopped counsel's discourse without waiting for an objection", Viereck v United States, 318 U.S. 236, 248 (1943). For other cases where, despite the absence of objection, prosecutors' misstatements have led to reversals under the "plain error" rule, see Stewart v United States, 101 U.S. App. D.C. 21, 247 F.2d 42 (1957); Wagner v United States, 263 F.2d 877 (5th Cir. 1959); United States v Graham, 325 F.2d 922 (6th Cir., 1963).

Defendant is entitled to a trial in which he is judged upon the evidence presented, free of prosecutional misconduct. His present convictions must be reversed.

III. THE "EYEWITNESS" TESTIMONY WAS IMPROPERLY ADMITTED

Both of the "eyewitnesses" to the assault on Mrs. Southerland - Mrs. Stephens and McNeil - observed defendant being brought to the scene of the crime in police custody a short while later. This experience, in all the circumstances of this case, was so suggestive as to preclude admission of their identification testimony at trial under the rule announced in Stovall v Denno, 388 U.S. 293 (1967).

Stovall was one of three cases in which the Supreme Court enunciated rules governing pre-trial confrontations between potential eyewitnesses and suspects. The "lead" case was United States v Wade, 388 U.S. 218 (1967). At the outset in Wade, the Court noted the untrustworthiness of eyewitness identification, 388 U.S. at 228:

> "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification...The identification of strangers is proverbially untrustworthy."

The Court next noted the important role which pretrial confrontations may play in leading to mistaken identifications, 388 U.S. at 228-29:

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identity has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

> A commentator has observed that 'the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor - perhaps it is responsible for more such errors than all other factors combined.' Wall, "Eyewitness Identification in Criminal Cases 26". (Emphasis Supplied).

The Court was particularly concerned about the suggestive impact of a witness seeing the defendant alone (rather than in a lineup) in the custody of the police, 388 U.S. at 234:

> "[T]he vice of suggestion created by the identification in Stovall, post, was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." (Emphasis Supplied).

To counter these inherent dangers, the Court held in Wade that the right to counsel extends to confrontations between suspects and eyewitnesses to crimes, 388 U.S. at 237.

In Stovall, however, the Court announced that Wade would not have retroactive application (i.e., to confrontations which had already occurred by June 12, 1967). Accordingly, the absence of counsel in prior confrontations would not require the exclusion of testimony of eyewitnesses who

had participated in such confrontations. 388 U.S. at 296, 300-01.

The confrontations between defendant and Mrs. Stephens and McNeil occurred on March 24, 1966, more than a year before Wade was decided. Accordingly, the absence of counsel was not fatal here.

This is, however, only the beginning, and not the end, of the inquiry. For the Court also announced in Stovall a rule which is applicable retroactively: that eyewitness testimony must be excluded where "the confrontation conducted... was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law", 388 U.S. at 302. As the Court explained:

> "This is a recognized ground of attack upon a conviction independent of any right to counsel claim. Palmer v Peyton, 359 F.2d 199 (C.A. 4th Cir., 1966). The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it..." (388 U.S. at 302).

In Stovall, the identifying witness was herself a victim. She had been stabbed eleven times, and was in critical condition. She was confined to a hospital bed and could not come to the police station for the usual

lineup procedure. She was "the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall". 388 U.S. 302. Accordingly, the Court concluded that "the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative" (ibid; emphasis supplied), and allowed her testimony notwithstanding the absence of a lineup.

We would agree that in this case, for precisely the same reasons, the police were entitled to bring about an immediate confrontation between defendant and Mrs. Southerland. Mrs. Southerland had been badly beaten; her injuries were so severe as to require two months' hospitalization (Tr. 56); and it was therefore "imperative" that the confrontation be immediate. Accordingly, we do not contest Mrs. Southerland's identification testimony (such as it was) at trial.

The same considerations are not applicable, however, to Mrs. Stephens and McNeil. It was not "imperative" that they confront defendant when they did. And it is evident that the experience was extraordinarly suggestive in "the totality of the circumstances".

In Wade, the Supreme Court noted that the danger of suggestiveness is greatest when the eyewitness' observations of the crime were limited and the suspect is a stranger to them. Both of these factors are present here. Neither Mrs. Stephens nor McNeil had ever seen defendant before. Mrs. Stephens was about 40 feet from the crime, which occurred at night, and she saw the crime only briefly. By contrast she got "a real good look at him", at a distance of only 4 or 5 feet, when defendant was later brought to the scene by the police. And she acknowledged that defendant was dressed differently than the assailant had been.

McNeil's only recollection of the assailant was his coat and the hammer, neither of which were present when defendant was brought to the scene by the police. McNeil could not identify Mrs. Southerland as the victim. Moreover, his positive identification of defendant as the assailant was shaken on cross-examination. His ultimate plea, "I know it was a man - it had to be the same man" (Tr. 85), is striking evidence of the suggestive impact which the confrontation had upon him.

We think it clear that, under Stovall, the confrontation between defendant, in the custody of the police, and Mrs. Stephens and McNeil was so "suggestive" as to render their identification testimony at a trial a denial of due process. //

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This Court's decision in Wise v United States, ____U.S. App. D.C._____, 383 F.2d 206 (1967), holding Stovall inapplicable to the facts there present, does not suggest a similar result here. In Wise, a burglar, caught in the act, fled from the house and was chased by the owner (Mr. Ross), who never lost sight of him. Mr. Ross ultimately caught the burglar, and they were together when the police arrived. The police thereupon took the burglar back to the Ross household where Mrs. Ross identified his voice as that of the intruder.

The burglar-defendant argued, inter alia, that under Stovall Mrs. Ross' voice identification was inadmissible. This Court, while acknowledging that "the presentation of only one suspect, in the custody of the police, raises problems of suggestibility that bring us to the threshold of an issue of fairness", 383 F.2d at 209, concluded that in this "hot pursuit" case, ibid, n. 9, the admission of Mrs. Ross' identification testimony did not deny due process:

/// The record does not show that the police deliberately brought about the confrontation (nor does it show the contrary). But Stovall is not a "police misconduct" case. The vice is the inherent unreliability of the testimony stemming from the confrontation, regardless of how it came about.

"Here was a confrontation proximate to the scene and the time of the offense as well as the apprehension, where the observers and actors were limited to those that were in fact present at the scene and time of the offense and the chase. Here were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability, and are not inherently a denial of fairness...[W]e do not consider a prompt identification of a suspect close to the time and place of an offense to diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals.

"Nor do we see any aspects of this particular identification by the actors at the scene that diverge from rudimentary fairness. Even with the impetus of a suspect apprehended and brought back by her husband and the police, the wife said she could not identify appellant by sight. It may be that in a particular case there would be reason, without denying the general principle of prompt identifications, to say that the particular identification at the scene was conducted in such an unfair way that it cannot tolerably be admitted into evidence. We find no basis for such a claim in the case before us." (383 F.2d at 209-10).

The present case, unlike Wise, did not involve a "hot pursuit". Defendant was arrested in his apartment and brought to the scene of the crime. Moreover, contrary to the clear evidence in Wise that the wife was not unduly influenced, all the evidence here strongly indicates that the confrontation had a highly suggestive effect upon Mrs. Stephens and McNeil.

Finally, we respectfully suggest that this Court's decision in Wise does not wholly accord with the Supreme Court's

reasoning in Wade and Stovall. The Supreme Court's concern about the unduly suggestive impact of a witness seeing the suspect in police custody is no less applicable because the confrontation occurs "proximate to the scene and time of the offense". As we read Stovall, it would allow such confrontations only where "imperative", 388 U.S. at 302. Nor is Stovall premised, as Wise assumes, upon evidence of police misconduct. Rather, it excludes evidence, however obtained, which is so heavily the product of suggestion that its potential for miscarriage of justice outweighs its evidentiary value.

Here, again, court-appointed trial counsel did not lodge an objection to the testimony. But the trial here was conducted only a few weeks after Stovall was decided, and it is quite likely that counsel, who had prepared for trial before Stovall was decided, [1] was unaware of it. If the eyewitness testimony was inadmissible under Stovall, it can hardly be disputed that its admission constituted "plain error... affecting substantial rights".

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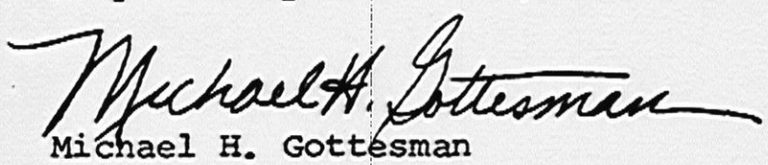
[1] The trial was postponed upon motion of the Government. See order granting continuance, dated June 28, 1967.

CONCLUSION

For the reasons set forth hereinabove, this Court should direct entry of a judgment of acquittal on the first degree murder charge, and remand for a new trial on the remaining issues.

Respectfully Submitted,



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BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,432

JAMES HEMPHILL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

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United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
ALBERT W. OVERBY, JR.,
Assistant United States Attorneys.

Cr. No. 678-66

QUESTIONS PRESENTED

1. Was there sufficient evidence of deliberation and premeditation to enable the jury to find appellant guilty of first degree murder? If not, should this Court modify the judgment below by reducing it to the lesser included offense of second degree murder?

2. Having failed to object to the instructions below, may appellant now be allowed to raise an objection thereto? If so, did the Court below properly charge the jury as to the difference between first and second degree murder?

3. Having failed to object to testimony by two witnesses whose identification he regards as constitutionally defective, may appellant now raise that issue for the first time on appeal? If so, were the circumstances surrounding the identification of appellant by witnesses Stephens and McNeil so unfair as to be a denial of due process?

4. Having failed to object to the government's summation below, can appellant now successfully assert that substantial prejudice accrued therefrom, where the evidence against appellant was strong, the challenged statements did not directly bear on guilt or innocence, and the trial judge twice carefully instructed the jury to confine their deliberations to the testimony and exhibits and inferences to be drawn therefrom?

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TABLE OF CASES

OTHER REFERENCES

*Cases relied upon are marked by asterisks.

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BRIEF AND APPENDIX FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed May 23, 1966 appellant James Hemphill was charged with the first degree murder of Phillip Richardson (22 D.C. Code § 2401) and an assault with a dangerous weapon (22 D.C. Code § 502) on Mary E. Southerland, which events were said to have occurred on March 24, 1966. On June 3, 1966 appellant appeared before Judge Keech and pled not guilty to the charges. By order filed July 13, 1966 appellant was committed for sixty days to St. Elizabeths for psychiatric examina-

tion. On September 8, 1966 Dr. David W. Harris informed the court that appellant was mentally competent to stand trial and that there was nothing to indicate that he was suffering from a mental disease on or about March 24, 1966. In an order filed October 21, 1966, Judge Matthews found appellant competent to stand trial. There was no objection by counsel. On March 23, 1967 Judge Robinson signed an order allowing the appointment of an independent psychiatrist, Dr. Robert Marland. He examined appellant and concluded in a letter of March 28, 1967 to the court that he was competent to stand trial and that "at the time of the alleged criminal offenses . . . his criminal acts "were not the product of mental disease or defect". Defense counsel concurred in an order of April 13, 1967 in which Judge Curran found that appellant was competent to stand trial and assist in his own defense.

Trial before Judge McGarraghy began on August 21, 1967. On August 22, 1967 the jury returned a verdict of guilty as charged with a recommendation of life imprisonment as to the first degree murder charge. Appellant was sentenced accordingly as to that charge and received three to ten years on the assault with a dangerous weapon count, the sentences to run concurrently. This appeal followed.

I. The Government's Case

Mary Southerland was the first principal witness for the government.[1] She had been the common law wife of Mr. Southerland for eighteen years (Tr. 33, 34). At the time of the events at issue she lived with him and her grandson in a row house at 3902 C Street, S.E. (Tr. 34). She had lived there four years, preceded by a period of about five years at 239 Burns Street, S.E., where she

[1] Her sister, Katherine Graham had already testified. She had identified the remains of her grandnephew and Mary's grandson Phillip Richardson. She did not know appellant and was not present when the murder occurred (Tr. 30, 31).

became acquainted with appellant, who lived in the same building (Tr. 35, 36). He came to their apartment often when they lived on Burns Street (Tr. 36). Since they had moved, she had seen him at least twice prior to the night of the murder, the last time being in the early part of summer (Tr. 37).

On the night of March 24, 1966 Mrs. Southerland and her grandson were watching television around seven o'clock when appellant knocked at the front door (Tr. 37, 58). They talked for two or three minutes. Appellant said " 'Let me have a quarter. I want to get a fifth of wine' " (Tr. 38). She complied and appellant left. He returned with the wine in what the witness estimated to be less than an hour (Tr. 39). They conversed generally, talking and laughing, without arguments and/or heated discussions, while seated four or five feet apart (Tr. 40-42, 54). She did not threaten or hit him during this period (Tr. 54). She drank a jigger of the wine, which represented the extent of her imbibing that day (Tr. 40). She couldn't say whether appellant had previously been drinking, but noted that "he did not act that way" and that she "didn't smell anything on him" (Tr. 40).[2] The last time she saw the wine bottle, it was about half full (Tr. 41). Phillip went upstairs (Tr. 43).

As the evening went on appellant's conversation was slow and she found herself more or less carrying on the conversation. She kept repeating that she was tired. Asked if anything unusual occurred during the conversation, she noted that appellant "kept getting up, walking back and forth to the window" (Tr. 44). At 9:00 o'clock he said that he was going. Mrs. Southerland said "[A]ll right, James, I am glad you came by". Appellant "walked to the window, looked out, came back and sat down" (Tr. 44). At 9:30, appellant again started to leave. "He leaned on the window, looked up and down the street, walked back and sat down" (Tr. 45). Appellant talked

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[2] Later, the complainant testified that she wouldn't say that appellant was drunk; he had no difficulty walking or talking (Tr. 55).

about his friend Mrs. Betts, who had been giving her daughter so much money and said that he'd told Mrs. Betts that "if she ever gave her another cent he'd kill her" (Tr. 43). At twenty minutes to ten, appellant again went to the window. The witness again said she was tired and that she was not going to wait up for her husband as she usually did (Tr. 45). She noted that appellant "kept asking [her] over and over each time he would be walking to the window, 'What time did you say George gets home' ". And, she noted that he kept asking her if her daughter was coming over as well (Tr. 46). She testified:

> At 20 minutes to 11 he got up again and he looked up at the clock. He said, it's twenty minutes to 11. I said, it most certainly is, Mr. James, and I have to go to bed. So he says, yes, I have got to get home, too.
>
> He walked over to the window and leaned down on the windowsill looking up and down the street. It seemed liked such a long time. I can't judge because of my being tired and bored. It probably seemed longer than it was. But I dropped my head down in my hand like that.
>
> I raised my hand up and I reached over on the table. I don't recall whether I was going to pick up the cigarettes or the . . . crossword puzzle, but when I did reach over, something struck me on the side (Tr. 46-47).

She looked up, thinking that "probably a little whatnot" had fallen from its place on the wall. Her glasses had come off with the blow. She was still being struck, and the next thing she remembered was being on the floor. She testified that there was no one else in the room except appellant when she started feeling the blows. She could not see what was happening to her (Tr. 47, 49).[3] When she saw she couldn't defend herself, she let herself go "like that"—that is, she just lay still (Tr. 48). While

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[3] The witness had been blind in her left eye prior to March 24, 1966 (Tr. 63).

she was lying on the floor, she heard what she described as "quick footsteps and for a short distance . . . [which] seemed like they were going to the door" (Tr. 49).[4]

The witness then cautiously dragged and felt her way to a hallway leading to the utility room (Tr. 50-51). She managed to support herself enough to get the door open. As she dragged herself out of that door, she heard Phillip "screech" in a manner which she had never heard before (Tr. 51). She said "I don't know whether he was saying 'no' or 'oh'. It was an 'oh' sound" (Tr. 51). When she heard this, she screamed. She didn't know if she passed out or not, but the next thing she recalled was trying to pull herself to her feet by using a post supporting a rose bush in the backyard (Tr. 52). As she did so, she was struck again. She did not see where the blows come from. She recalled being struck twice, but then she passed out (Tr. 52-53). When she next regained her senses, she was screaming for help and banging on the door of Miss Bone, her neighbor (Tr. 53).

Appellant was brought to Mrs. Bone's house after he was arrested. Mrs. Southerland there identified him as the same man who had been in her house (Tr. 54). She was taken from Mrs. Bone's house to D.C. General Hospital, where she stayed for two months (Tr. 55-56).

On cross-examination, it was established that the witness did not know the whereabouts of Mr. Smith, the man to whom she had been married (Tr. 56-57). She said that appellant used to drink with her, "[u]sually when [Mr. Southerland] was present" (Tr. 57). Margaret Betts also drank with them (Tr. 58). Mrs. Southerland said that during the course of the conversation with appellant, he did not say anything about Margaret Betts giving money to Mr. Southerland (Tr. 60). When asked if she saw who struck her, she said "Yes, I saw who struck me" (Tr. 60-61). Counsel again asked the same question. She

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[4] Shortly thereafter she said she could not tell the direction in which the steps went because she didn't know what part of the room she was lying in (Tr. 49). The footsteps were not, however, on the stairway (Tr. 62).

replied: "Mr. Hemphill was standing directly beside—" Counsel interrupted her, saying that was not the question, and asked again if she saw who hit her. This time she said "To be looking directly at him as I am looking at you, no, I did not look directly at him" (Tr. 61).

On redirect examination, she testified that she never had an intimate relationship with appellant, although it was through him that she met her very good friend Mrs. Betts (Tr. 64).

Paul McNeil then testified. On the night in question, he was visiting his sister at 3947 Burns Place (Tr. 66). Sometime after 10:00 that night, he was at the back door of his sister's apartment, when he heard Mrs. Southerland saying "something like, 'He is killing me. Somebody help me, please' ". Because of this, he went out of the door and into the backyard to take a look. The witness "stepped out the door and got a look at him" (Tr. 70). He saw a man striking a woman with "some object" (Tr. 67). Nobody else was in the yard (Tr. 74, 75). There was a light on the top of the adjoining building, and the witness testified that the lighting was "relatively good" (Tr. 68-69). He then went back into the house, out the front door, and started up the street (Tr. 71). He saw a person he referred to as the same man he had seen in the backyard coming out of the same house he later saw deceased removed from (Tr. 79). The man "had a hammer down beside him with his coat thrown back—jacket rather". The witness "stepped back off the sidewalk so he could come by" because he "thought he might clobber me", then continued to the bus stop on Ridge Road (Tr. 72, 75). From there he saw Mrs. Southerland "moaning and trying to get up and falling back down" (Tr. 76). He then started back down C Street to call the ambulance and the police. As he did, he saw the same man "going down over the hill, down over the bank" (Tr. 77). The police were "at the house".[5] The

[5] The record does not indicate whether the witness was referring to his sister's apartment, Mrs. Southerland's apartment, or Mrs. Bone's apartment.

witness indicated to them the direction which the man had taken (Tr. 78). A "few minutes later" the police returned with appellant (Tr. 79). When the witness had first seen the man, he had on "a dark color, maybe grey or light blue jacket or coat" (Tr. 74). When he saw him this time, he noticed that the man was dressed differently. "He had a clean T-shirt on and the coat was gone" (Tr. 79-80).

The witness did not know appellant or the Southerlands (Tr. 80). He identified appellant in court as the man who was striking Mrs. Southerland (Tr. 68-69). When asked if the hammer recovered from appellant resembled the one he saw appellant carrying, he said "It definitely does" (Tr. 74).

On cross-examination, the witness said that "You can see the whole area plain as day", and estimated that he saw the struggling couple from a distance of 35 to 40 feet (Tr. 83). While at that point he could not have identified Mrs. Southerland as the female he saw, he said he could identify appellant and that "[appellant] was the same man that came out of the house" (Tr. 84, 85).[6] On redirect examination, he testified that he watched the struggle for three to five minutes; that when appellant passed him on the sidewalk, he was "no more than three or four steps away"; and that visibility was fairly good there because of a street light on the corner (Tr. 89).

Mrs. Joyce Stephens lived at 3974 Burns Place, next door to Mr. McNeil's sister (Tr. 92-93). She was watching television when she heard someone screaming "Somebody please help me. He is going to kill me". She ran to the window and "saw Mrs. Southerland running from her home" (Tr. 94). A man she identified in court as appellant was running behind her (Tr. 95). She described the scene:

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[6] The witness then said "Yes, I could [identify the male figure as Mr. Hemphill]. It is the same man. I will take that back. It was a man of the same description" (Tr. 85). He also said "I stepped outside the door to get a closer look. That is why I know it was a man—it had to be the same man" (Tr. 85).

> He was running behind her with his hand over his shoulder. She stumbled and fell midway in her backyard and Mrs. Bone's. As she fell, he bent over her and struck her several times. I hollered out of my window, "What in the world is going on out there." He stopped momentarily and glanced up at the window and looked back down at her and returned in her back door . . .
>
> It appeared to be a small object that he had in his hand, but as he turned to go in the house—We have floodlights on the back of these houses—the light made a reflection on the top of the object and I saw then that it was a hammer (Tr. 95-96).[7]

The witness came downstairs to her back door and called to Mrs. Southerland. She didn't move at first; but then she "started to creep towards Mrs. Bone's back door and she got there and banged on the door" (Tr. 98). The witness went back upstairs; she came back down when appellant was brought back (Tr. 98).[8] She noticed that he was dressed differently in that he originally had on an open-collar shirt, but when he came back, he had on a T-shirt (Tr. 99). She testified that she got a close look at appellant and that he was not obviously drunk (Tr. 100-01). She had no trouble seeing because of the lights. She had seen Mrs. Southerland before but not appellant (Tr. 97). She saw no one else but appellant go in and out of Mrs. Southerland's apartment, nor did she see anyone else in the backyard but him and Mrs. Southerland (Tr. 95, 99, 100-01).

Mrs. Eugenia Bone lived at 3904 C Street on the night in question. She heard "a scream and a thumping" coming from the direction of 3902 C Street (Tr. 108-09). She looked out of the back window and saw a female

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[7] She said that the hammer shown her in court resembled the one appellant had and that it was approximately the same size (Tr. 96).

[8] When asked how long it was until appellant was brought back, she said "I don't really know. The span of time wasn't long, it wasn't that long" (Tr. 99).

lying on the ground (Tr. 109-10). She called the police and then went downstairs. She heard her name called from the back of her house, opened the door and helped Mrs. Southerland into her laundry room (Tr. 110). She described Mrs. Southerland as "just a red figure from head to foot" (Tr. 110).

The police brought appellant to her house. She had never seen him before, but she identified him as the person they brought in (Tr. 111-112). She testified that Mrs. Southerland identified appellant in her home.

Detective Mosrie was the next government witness. He responded to Mrs. Bone's call (Tr. 115). When he got to her apartment, Mrs. Southerland was seated in the back room "covered with blood from head to foot" (Tr. 115-16). He went to 3902 C Street because of information received from them. He described the premises:

> I went over . . . and the door was open. I walked in. I stepped into the living room. I noticed the table was overturned, the lamp was on the floor like there had been a scuffle. There was blood on the floor, furniture and on the walls. Then I went up the steps to the second floor and there was a bedroom with a light on.
>
> I walked into the bedroom and I observed at that time a boy laying on the bed. I later found out this was Phillip Richardson and he was ten years old. He was covered with blood. There was blood all over the bed, the walls, the floor, just all over the place. . . .
>
> There were a couple large pools of blood on the floor . . . [of] the living room. There was blood on the drapes, blood on the chair, some on, I believe the lamp and the table which were knocked over. I even recall seeing a bloody hand print on the wall towards the kitchen. . . .
>
> Then I went back upstairs and, as I said, there was blood on the bed, on the walls and on the floor. (Tr. 116-18).

The officer then returned to Mrs. Bone's apartment. As a result of conversations with Mrs. Southerland, he

then went to 239 Burns Street, S.E. (Tr. 118). Appellant was there, dressed in a white T-shirt and brown trousers (Tr. 118-19). The officer observed little specks of blood about his chin. He was "very calm" and did not appear to be inebriated (Tr. 119). Appellant was then taken back to 3904 C Street,[9] where he was identified by Mrs. Southerland in the presence of Mrs. Bone (Tr. 120).

The next day, the officer obtained and executed a search warrant at appellant's home (Tr. 120). He recovered from the hall closet a pair of trousers and a hammer. The officer said "[T]hey had on a substance which I thought to be blood" (Tr. 121). The officer identified in court a pair of trousers and a hammer, and these items were admitted without objection (Tr. 121-22). The officer also recovered a blue shirt from the radiator in appellant's living room;[10] a cap from the coffee table; and a towel, washcloth and white handkerchief from the bathroom. He testified that "On all of these there appeared to be a substance which I thought could possibly be blood" (Tr. 122). Those items were also received in evidence without objection after the officer identified them (Tr. 123).

Dr. Marion Mann, deputy coroner of the District of Columbia performed the autopsy on the remains of Phillip Richardson. He described the boy's external injuries as follows:

> There were lacerations on the scalp, especially on the right side of the scalp. And these abrasions and lacerations had a curved pattern. I made a note that one of these measured two and a half inches in length in its curved pattern . . . There were black eyes, a black eye on the right and a sutured laceration on the left ear and on the left upper arm. On both legs there were purplish bruises. (Tr. 126-27).

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[9] The record indicated that appellant's home was "just around the corner" from the scene of the crimes (Tr. 120).

[10] According to the officer, the shirt was "draped across the radiator as if it were placed there to dry" (Tr. 124).

He said that cerebral contusions caused the death—that is, "bruises of the brain and skull fractures" (Tr. 127). It was his opinion that the bruises and fractures were the result of forces being exerted against the head with a blunt instrument (Tr. 127).

Dr. Mann's testimony concluded the government's case. Defense counsel moved for judgment of acquittal *inter alia* on the grounds that there had "been not the slightest indication of premeditation and deliberation" (Tr. 129). The motion was denied (Tr. 130).

II. The Case for the Defense

After the government indicated it would not use appellant's 1952 conviction of manslaughter for impeachment purposes, appellant took the stand. He testified that he went to the home of Mrs. Southerland around 8 o'clock on the evening in question. He knocked on the door, went in and she asked him "what are we drinking tonight" (Tr. 134). According to him Mrs. Southerland gave him a quarter upon request and he added fifty cents to it and went to the store and got the wine (Tr. 135). He testified that he drank the wine, "talked about everything this, that and the other" and finally Mrs. Southerland dozed off to sleep. He then got up and went home (Tr. 135). A "pretty good while" later a detective came to his home and asked if he was James Hemphill. He claimed to have told the detective that if Mrs. Southerland was assaulted it happened after he left (Tr. 135).

His testimony paralleled Mrs. Southerland's insofar as it indicated that Phillip had gone upstairs during the course of his visit (Tr. 136). However, he also added that Phillip was "crazy" about him (Tr. 133).

On cross-examination appellant explained why he had stopped by Mrs. Southerland's apartment:

> I just stopped by to see—I caught George [Southerland] and my girlfriend together. I caught them together on March 6, so I just went by there to see what I could find out from her . . . I caught them

> together. You know what I mean . . . You know, I would go there and she would say, "Well, we had a half a pint Sunday, but that's all we had. We don't have no more money to get no more, but George went to get his hair cut Monday morning and got a pint of whiskey." So that is what I went by there to find out. (Tr. 137).

He knew Mr. Southerland wasn't there when he went there (Tr. 137). Appellant did not want to talk to Mr. Southerland about the affair; he wanted to talk with Mrs. Southerland because "he knew she would tell him why he got extra money to buy whiskey with" (Tr. 138).

He testified that each of them drank about half the wine but that he wasn't drunk and that he remembered clearly everything that happened (Tr. 139). He also testified that no one else came during the time he was there (Tr. 139-40). He said that it "wasn't quite 10:00 [p.m.] o'clock when he left". He also testified that he did not go into the backyard, that witnesses McNeil and Stevens were both wrong when they said that they saw him there (Tr. 140-41). He said that he had "a bag full of hammers in his apartment" but that he had no hammer in his hand when he left Mrs. Southerland's apartment. The following colloquy then occurred:

> Q Your hammer had blood on it, didn't it?
> A I don't know whether it did or not. I have a boy down in Marlboro. He's got over 200 head of hogs down there and one of the hogs broke out of the pen and I helped him get that hog and—
> MR. TOOMEY: If I may interrupt at this point, I object to the Government bringing up the question of "your hammer had blood on it." There has been no evidence that a hammer had blood on it. There has been a statement by a police officer—
> THE COURT: That is evidence.
> MR. TOOMEY: There was no proof that there was blood on it. The police officer said he picked up a hammer that had a stain on it that looked like blood.

THE COURT: That is right.

THE WITNESS: I have several hammers, a whole bag full.

Q Is this how your hammer got blood on it?

A I fixed the hog pen and we got that hog in and grind him up in sausage meat. (Tr. 141-42),

When asked if that was how his clothes got blood on them, he said that there was no blood on his pants. He denied having changed his clothes after he left Mrs. Southerland's, and said that he had on blue pants and a brown coat and a T-shirt when he was there. He explained the presence of the shirt found on the radiator by saying that he had scrubbed and waxed his house that morning and had put it there when while he was waxing the floor (Tr. 143).

According to him the last time he had been over to Mrs. Southerland's house had been two or three weeks prior to March 24, 1966 (Tr. 143-44).

He testified that he had gotten home from Mrs. Southerland's "[a]round the sidewalk around C Street"; that he went directly home and that it was quite a long time —"three-quarters of a hour or something like that" before the police arrived there. He testified that Mrs. Southerland had in fact identified him at Mrs. Bone's house (Tr. 146). After a brief redirect examination, the defense rested (Tr. 148).

III. Post-Testimony Proceedings

At a subsequent bench conference counsel renewed his judgment for acquittal on first degree murder, citing *Austin* v. *United States*, —— U.S. App. D.C. ——, 382 F.2d 129 (1967). The court said in response to counsel's argument:

> I will respect Austin to the extent that I will not charge as the judge did in that case in which the Court of Appeals critized. In other words I will not get down to the seconds (Tr. 150-51).

Counsel agreed that second degree murder should be charged as an included offense and said that "if the court is asking me what I think academically, I believe it is either first, second or nothing" (Tr. 151). The court indicated that it would give instructions on first and second degree murder and asked if counsel had any requested instructions. Counsel did not. In discussing the issue of intoxication the court opined that there was no evidence of it (Tr. 152). The court then asked if defense counsel had anything else to which he replied "nothing" (Tr. 152).

Closing arguments were made on August 22, the second day of trial. The government's initial argument included a statement that when the police went to appellant's apartment pursuant to the search warrant, "they [found] a hammer there which [had] a stain on it which resemble[d] blood" (Tr. 165). Summation continued:

> He tells you he got it from hitting hogs, I believe. You can believe that if you want to. If you want to, you can believe that. Also, they find clothing. Is there anything unusual about the clothing? Yes. There is blood on it or a substance that looks like blood. How did that get on there? From hitting hogs (Tr. 165).

Defense counsel countered on this point:

> [The police officer] further testified that a matter of days, I think 2 days later or the next day, he secured a search warrant properly and he proceeded back to the home of the defendant. What did he get? At that visit he secured trousers. He secured a shirt. And he secured the hammer and several other miscellaneous pieces.
>
> However, why, asked Mr. Collins, did you take these. Well, they had stains on them that appeared that they might have been blood. Here is the hammer. Here is Government's Exhibits No. 3, namely, the trousers, not particularly pleasant. I have examined them. I do not see any stains visible to the naked

eye. I don't see a single stain other than the ordinary dirt stains that would appear on a piece of clothing.

Here is the shirt. I doubt that this is blood on the shirt. Other than the initials, I am unable to find any foreign stain other than ordinary stains.

Was there any evidence presented that there was in fact blood on these trousers, on this shirt, on the hammer? Is there any evidence beyond the fact that an officer picked him up because he had stains that he thought might be blood? I don't see it. . . .

They said they found bloody clothing. To my layman's eye, I have yet to see a piece of bloody clothing. Please feel free to look at these pieces of clothing. I can not see where there is any blood or indication of blood. . . .

Here is another element on this blood-stained crime. Do you remember the officer describing the great amount of blood on the floor, on the walls, on the furniture upstairs in the bedroom, and I believe there was a handprint on the wall in blood.

Is there any evidence that there was any blood taken from this man's finger nails? Is there any evidence as to fingerprints? There is not one scintilla of direct evidence in this case.

If you could convict, you base a conviction on the testimony of two eyewitnesses who are at best weak when their testimony is examined thoroughly, plus the testimony of the victim of one of the counts who at best is confusing, completely.

You have no evidence that modern criminal investigation should have. Such evidence, from the way the case has developed from the testimony of Mrs. Southerland, obviously would have been presented. A bloody handprint on the wall. What more obvious step to take than to take the finger prints of this defendant and compare them. This would have been direct evidence. (Tr. 176-79).[11]

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[11] Defense counsel also stated:

> [Mr. McNeil] saw a man with blood smeared on his face. He was so frightened he stepped off the sidewalk . . . .
>
> Now he meets what apparently, according to the testimony, was a madman, blood dripping, walking down the street. He

The prosecutor argued, *inter alia*, in rebuttal:

> And I submit to you . . . that you are not going to believe this testimony when you consider what he said about the blood on the hammer and the blood on the clothing. He said he got it by hitting hogs. You notice counsel didn't talk about that much in his argument. Apparently he didn't like that story too well so he didn't mention that to you. . . .
>
> He talks about fingerprints on the wall and that he can't see blood on the clothing. Of course you can't see it a year and half later. Don't forget, when Officer Mosrie recovered those items, it was the next day. It wasn't two days later. But a year and a half later, counsel argues to you that he can't see any blood on the clothing.
>
> Ladies and gentlemen . . . I don't think you are going to be snowed by any argument like that. I think you are going to consider the facts in this case and not be sidetracked or derailed from your thinking. . . .
>
> Now counsel talks to you about fingerprints. Ladies and gentlemen of the jury, how are you going to get fingerprints off a wall that is smeared with blood? I ask you. Of course you can get fingerprints if you have something to take them off. But they have to dust surfaces in order to get prints. How are you going to dust a bloody wall?
>
> I ask you . . . is there really any necessity in this case for fingerprints? Can there be any other answer to this case other than that this defendant struck Mrs. Southerland and walked upstairs and beat this little boy to death? (Tr. 187-89).

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steps off the sidewalk out of fear. Where does he go then? Does he call the police? No. He proceeds to the bus stop . . . . (Tr. 172-73).

Later, he remarked:

> There is one point I overlooked. If you remember Mr. McNeil's testimony, there is a very interesting point. His testimony was that after he observed the defendant and he jumped off the sidewalk and the defendant in this bloody fashion, carrying the hammer, walked down the street, he observed him going over a hill, we assume, to his home . . . . (Tr. 182).

No objection was made by defense counsel to or during the government's summation.

The pertinent instructions are set out in Appendix A. After they were given, defense counsel asked the court if it would be willing to advise the jury that they are entitled to ask for any evidence. The court indicated that it would (Tr. 210). Defense counsel then suggested that the court had not "covered sufficiently the fact of whether the jury can consider the lack of evidence as well as the evidence, and also that the defendant does not have to present evidence, that he has a right to rely on the Government to—". The trial judge replied that he thought that had been done, and there the matter rested (Tr. 210). No other objections were voiced.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2401, provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or an assault with a dangerous weapon shall be sentenced to imprisonment for not more than ten years.

SUMMARY OF ARGUMENT

I

Appellant's motion for judgment of acquittal of first degree murder was properly denied. The evidence viewed under the proper standards in this jurisdiction showed facts and circumstances from which deliberation and premeditation could properly be inferred by the jury. While in Mrs. Southerland's presence appellant's actions indicated nervousness and apprehension about the possibility that someone would arrive at her apartment. The testimony established that murder was committed with a hammer and we submit that appellant could properly have been said to have arrived on the scene with that object. That he did so provided a basis from which, when coupled with the other evidence, a proper finding of premeditation and deliberation could have been made.

II

Assuming *arguendo* that there was insufficient evidence of premeditation and deliberation under *Austin* v. *United States*, *supra* and *Howard* v. *United States*, *post* this Court can properly modify the judgment of first degree murder to that of second degree murder, inasmuch as the evidence amply established that offense and appellant would not be prejudiced thereby.

III

Appellant's claim that the instructions as given were erroneous need not be considered here since they were unobjected to below. In any event they were proper and furthermore did not amount to plain error. The "appreciable time" element was not downgraded; the basic concepts of premeditation and deliberation were properly explained; and while the court drew no distinction between killings in cold blood and hot blood, under *Belton* such a defect does not amount to plain error.

IV

Appellant's newly-hatched constitutional claim need not be considered here since it was not raised below. In any event the combination of necessitous circumstances by virtue of Mrs. Southerland's physical condition and the reasonableness of the police actions taken here bring this case squarely within the purview of *Wise* v. *United States*. Such prompt and effective identification procedures which could have immediately resulted in appellant's exculpation was plainly effective and intelligent law enforcement.

V

Appellant's contention that prejudicial defects inhered in the summation and the testimony of the police officer with respect to blood on the items recovered in appellant's apartment need not be considered here. Clearly the officer could describe the items so recovered and the circumstances—to wit the strength of the case against appellant, the relative unimportance of the statements attacked when viewed against the uncontradicted identification testimony and the trial judge's emphasis on confining the jury's consideration to the exhibits, the testimony and the inferences to be drawn therefrom—negate any contention that substantial prejudice accrued to appellant because of the government's summation.

ARGUMENT

I. The trial judge properly denied appellant's motion for judgment of acquittal of first degree murder.

(Tr. 37-38, 43-53, 58, 67-72, 74-75, 78-80, 95-96, 99, 100-01, 116-19, 121-24, 126-27, 134, 137-42, 144, 151)

Appellant asserts that there was insufficient evidence of deliberation and premeditation to allow the jury to consider first degree murder. This Court should reject appellant's contention.

The standard to be applied in considering such a motion at trial and on appeal is well settled. Viewing the evidence, including legitimate inferences draw therefrom, in the light most favorable to the government, unless reasonable jurymen must necessarily have a reasonable doubt, the case is properly submitted to the jury. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60 (1942); *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967). Reasonable jurymen need not have had such a doubt here.

The government's evidence, viewed in the light most favorable to it, established that appellant came to Mrs. Southerland's apartment (Tr. 37, 58); that he left to get and returned with some wine (Tr. 37, 38); that the deceased went upstairs (Tr. 43); that appellant's conversation was slow and Mrs. Southerland bore the burden of carrying on the conversation, despite her repeated reminders to him that she was tired (Tr. 44); that appellant "kept getting up, walking back and forth to the window" and "kept asking [her] over and over each time he would be walking to the window" what time her husband would return from work and if her daughter would visit her (Tr. 44-46). It established through her testimony that she started to receive blows at a time when appellant was the only other person in the room, which blows only stopped when she ceased to move (Tr. 47-49). It established that after she managed to grope her way out of the back door of the apartment, she heard her grandson cry out "no" or "oh" in a manner which she had never heard before; that the next thing she remembered was trying to pull herself up by using a post in the backyard, at which time she again began to receive blows (Tr. 50-53).

Mr. McNeil's testimony established that he saw appellant emerging from the house in which the murder occurred with a hammer, and that he had seen appellant striking "Mrs. Southerland with some object" (Tr. 67, 72). Moreover, he pointed out to the police the direction

which appellant had taken and when he was brought back with them a "few minutes later", he noticed that appellant was dressed differently (Tr. 78, 79, 80).

Mrs. Stephens testified that appellant wielded a hammer in striking Mrs. Southerland in the backyard (Tr. 95-96). She also noticed that appellant was dressed differently when brought back by the police (Tr. 99). Neither witness saw anyone else in the backyard but appellant and Mrs. Southerland (Tr. 74, 75, 100-01).

We need not detail the gory evidence of violence and the description of the multiple wounds of the ten year old deceased adduced through the testimony of the arresting officer and the deputy coroner (Tr. 116-18, 126-27). However, these two witnesses did establish that appellant had specks of blood on his chin; that recovered from appellant's apartment were a blue shirt, placed on the radiator as if to dry, a cap, a towel, washcloth, white handkerchief and a hammer, all of which had what appeared to be blood on them (Tr. 121-24); and that (in the coroner's opinion) the bruises and fractures resulted from a blunt instrument (Tr. 119, 127). From these facts the jury could well have concluded that appellant had brutally beaten Mrs. Southerland with the hammer, ceasing only when she feigned unconsciousness, gone upstairs after having done so and belabored her grandson with that same instrument and despite his screams, come back downstairs only to find Mrs. Southerland gone, followed her out into the backyard and again began to beat her with the hammer. These facts clearly allowed a jury verdict of at least second degree murder, *Howard* v. *United States*, D.C. Cir. No. 20,328, decided December 6, 1967 (Slip opinion at 3, 4); *Austin* v. *United States*, —— U.S. App. D.C. ——, 382 F.2d 129, 138 (1967), and neither defense counsel below nor appellate counsel here seriously contend otherwise (Tr. 151; Br. 20-26). The government also submits that the circumstances surrounding the slaying, considered *in toto*, provide a legitimate basis for the jury's determination that appellant murdered his victim with deliberate and premeditated malice.

While the government was unable to show any motive for the crime in its direct case, nor any prior threats or quarrels with either Mrs. Southerland or her grandson,[12] a condition precedent—the existence of time in which to premeditate and deliberate—was clearly met here. Appellant was in the apartment with the two victims for at least two hours (Tr. 37, 44, 45, 46-47, 134, 140). During this period, appellant acted in a manner which indicated that he was concerned about the possibility that someone might come to Mrs. Southerland's apartment, as set out above. Moreover, he ignored Mrs. Southerland's veiled but fairly strong requests that he depart. The jury could have concluded from this that appellant arrived on the scene with at least a preconceived design to do harm to Mrs. Southerland and her grandson and inferred that he was mulling it over from his actions. But the circumstances were such that the jury could have concluded that his purpose was more specific—to wit, to murder in cold blood Mrs. Southerland and her grandson, as shown by the use of a hammer in the attacks. True, there was no *direct* evidence that appellant arrived at Mrs. Southerland's with the hammer recovered from appellant's apartment. But the murder was done with a blunt instrument. The witnesses saw her being struck by appellant with "some object" or a hammer in her backyard. Appellant was later seen to leave with a hammer in his possession. Given the inherent improbability of appellant's having

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[12] While we do not rely on these facts to sustain submission of the case to the jury, see *Belton* v. *United States*, *post* at —— n.2, 382 F.2d at 152 n.2, the case for the defense showed that appellant came to Mrs. Southerland's apartment knowing that her husband was not there; that he wanted to find out from her (but not him) why her husband was able to afford whiskey and haircuts after appellant had caught his girlfriend and Mr. Southerland together on March 6 (Tr. 137-38). But Mrs. Southerland's testimony indicated that he did not speak of this matter to her (Tr. 60). The jury may well have thought that appellant's actions stemmed from his desire to get back at Mr. Southerland through his family. It also established that appellant had been a carpenter's helper but had not worked since 1958 (Tr. 139, 141-42, 144).

picked up a hammer in Mrs. Southerland's living room,[13] in the light of everyday experience the jury could have concluded that he arrived on the scene possessing the hammer and the intent to employ it as it was later employed, especially in light of appellant's behavior during the course of the conversation with Mrs. Southerland. Certainly, such an implement would not be carried about by appellant as a matter of course. *Cf. Belton* v. *United States*, —— U.S. App. D.C. ——, 382 F.2d 150 (1967) (entry with a loaded gun into apartment where in which murder occurred permitted submission of issues of premeditation and deliberation to jury); compare *Austin* v. *United States*, —— U.S. App. D.C. ——, 382 F.2d 129 (1967) (knife used as murder weapon not probative of premeditation and deliberation because appellant usually carried it about with him). In addition, the inference of deliberation and premeditation would appear to be buttressed by the fact that appellant had to pull out or pick up the hammer, wield it against Mrs. Southerland until she apparently succumbed under the blows, then climb the stairs to her grandson's room and wield it against him despite his outcries. Of course, appellant's actual state of mind can never be known. But from the combinational factors here present, including the prolonged nature of the two beatings, the jury could have concluded that appellant either arrived on the scene having decided to dispatch both victims with the hammer or decided to climb the stairs with the hammer to kill the boy after having obstensibly finished off Mrs. Southerland. And, we submit, the discrete nature of the two acts strongly tends to negate a contention that appellant's actions were in the nature of a sustained frenzy.

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[13] Nothing in the government's case suggested that Mrs. Southerland had a hammer anywhere in her apartment, much less her living room. Given the peculiar nature of the weapon used, it would appear to be the case that had such an implement been present, she (or at least appellant) would have mentioned it in her testimony.

II. Assuming *arguendo* that there was insufficient evidence of premeditation and deliberation, this Court should modify the judgment of the District Court below by reducing it to the lessor included offense of manslaughter.

In *Austin*, the Court "remanded to the District Court with directions to enter a judgment of guilty in the second degree . . . unless the District Court determines that a new trial is in the interest of justice." *Id.* at ——, 382 F.2d at 143. But where it is clear that appellant could not have been prejudiced by the trial court's alleged error, that choice need not be given. *Howard* v. *United States*, D.C. Cir. No. 20,328, decided December 6, 1967 (Slip opinion at 11).

Here, appellant asserts no prejudice accruing from allegedly erroneous submission of the issue of first degree murder to the jury.[14] Nor was any asserted below. In fact, counsel agreed that the crime was "either first [degree murder], second [degree murder] or nothing" (Tr. 151). As appellant asserts, "[p]remeditation and deliberation are the elements which distinguish first degree from second degree murder" (Br. 21). But appellant's testimony was such that if it were believed, it would exonerate him of all guilt, not to negate evidence of premeditation. Just as in *Howard*, ". . . counsel did not argue for a finding of manslaughter, or even discuss it, but rather that his client was innocent; and the evidence was such that a jury which held [appellant] to be the killer would in all probability also go on to find that he killed with malice". *Id.* at 10. Accordingly, we submit that if the government's first argument is rejected, this Court should exercise its power to modify the criminal judgment to the lesser included offense of second degree murder, especially in the light of an already crowded District Court calendar.

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[14] Appellant's allegations of errors other than the submission of first degree murder to the jury are essentially unconnected to that issue, and in fact he eschews discussing appropriate disposition where, as we submit is the case, no other errors were committed below (Br. 34).

III. Appellant's claim that error lurked in the instructions, unobjected to below, need not be considered here. In any event, the instructions as given were proper and did not give rise to plain error.

(Tr. 40, 119, 139, 151, 210)

A. Appellant's claim that the instructions were erroneous need not be considered here.

Appellant's failure to object to the charge as given forecloses his assertions of error on appeal. *Cantrell* v. *United States*, 116 U.S. App. D.C. 311, 323 F.2d 613 (1963), *cert. denied*, 376 U.S. 955 (1964); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); Rule 30 Fed. R. Crim. P. By failing to object to the charge, appellant deprived the trial court of the opportunity to make additions or corrections before the jury retired to consider its verdict and thereby obviate the possibility of a futile trial. *Villaroman*, *supra* at 241, 184 F.2d at 262-63. Application of such a principle would be peculiarly appropriate here. Appellant had not one but two counsel to safeguard his interests. Neither submitted any specific instructions although the trial judge took care to ask if any were desired (Tr. 151). In fact, lead counsel agreed that the trial judge should charge on the lesser included offense of second degree murder, and opined that the charge should be on "either first [degree murder], second [degree murder] or nothing" (Tr. 151). After the instructions were given, neither defense attorney voiced any objection to the charge as far as the explanations of the requirements for first and second degree murder were concerned (Tr. 210). The government submits that these factors should preclude appellant's claim of error in this regard.[15]

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[15] Appellant seeks to parlay the renewed motion for judgment of acquittal on the basis of *Austin*, *supra* into an objection to the charge given by the trial court (Br. 32-33). This not only overlooks counsel's opinion, set out above, as to the charges to be given, it also overlooks the fact that counsel's objection clearly went to the question of whether there was sufficient evidence of premedita-

Of course, should this Court find that there was insufficient evidence of deliberation and premeditation and disallow the conviction for first degree murder, any claimed inadequacies in that portion of the instructions explaining the elements of deliberation and premeditation need not be considered. *Austin, supra* at ——, 382 F.2d at 138.

B. *The instructions given were proper, and in any event did not give rise to plain error.*

We understand appellant's position to be not that the "sparse" explanation of deliberation and premeditation alone resulted in error, but that trial court insufficiently explained the difference between first and second degree murder, which deficiency was heightened by an incomprehensible charge on second degree murder. His assertions, raised for the first time here, that reversible error occurred in this regard should be rejected.

The instructions did not contain the defects considered in *Austin, supra.* The trial judge said that an "appreciable time" was needed for deliberation, and did not say this could be accomplished in seconds. *Belton, supra* at ——, 382 F.2d at 152. In fact, he specifically pointed out that "it is the fact of deliberation rather than the length of time that is important". Accordingly, it cannot be argued and it is not here contended that "the appreciable time" requirement was downgraded as appellant contended in *Belton.* In this respect, the requirements of *e.g., Bullock* v. *United States,* 74 App. D.C. 220, 122 F.2d

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tion and deliberation, not to the wording of the charge as it would be given. The purpose of requiring objections to a charge—clarification of its language—is clearly not served by raising the preliminary question of whether it should be given at all.

We do not believe, as appellant suggests, that the first sentence of the trial judge's response to the motion for judgment of acquittal can be construed as leading counsel to believe that he would get the whole *Austin* charge (Br. 32). The trial judge was clearly referring to the charge on "seconds" as given therein. In any event, counsel could not have been misled after the charge was given. He did not object to it then.

213 (1941); *Bostic* v. *United States*, 68 App. D.C. 167, 94 F.2d 636 (1937), *cert. denied*, 303 U.S. 635 (1938) and *Frady* v. *United States*, 121 U.S. App. D.C. 78, 348 F.2d 84, *cert. denied*, 382 U.S. 909 (1965) were met.

As in *Belton*, the trial judge charged the jury that premeditation was "the formation of the intent or plan to kill the formation of a positive design to kill" and that "deliberation means further thought upon this plan or design to kill". Thus the two necessary core concepts of (1) giving prior thought to the idea of taking a human life and reaching a definite decision to kill and (2) consideration and reflection on the design to kill were met. See *Fisher* v. *United States*, 328 U.S. 463, 469-70 n.3 (1946). Thus, though tersely propounded, the explanation by the trial judge properly conveyed to the jury what deliberation and premeditation meant.[16] If it be said that there could have been a fuller explanation of these two elements, we need only to cite *Belton* for the proposition that such instructions in the absence of objection do not amount to plain error. *Id.* at ——, 382 F.2d at 153.

Appellant asserts also that the jury was afforded no insight into the difference between first and second degree murder. This Court has stated that drawing a distinction between intentional killings in terms of cold blood and hot blood is more understandable to a jury. *Austin*, *supra* at ——, 382 F.2d at 137. But to say that such a distinction was not drawn is not to say that reversal will follow in the absence of an objection. As this Court pointed out in *Belton*, "*On request*, an accused is entitled to instructions that make clear the distinction between the first and second degrees of murder by reference to the distinction between killings in cold blood and killings on impulse". *Id.* at ——, 382 F.2d at 153 (emphasis added). But the Court nevertheless affirmed appellant's conviction of first degree murder, saying that the

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[16] The jury did not ask to be reinstructed on premeditation and deliberation. *Cf. Belton, supra* at ——, 382 F.2d at 152.

instructions were "skimpy",[17] but that "they did set forth the difference between the degrees of murder sufficiently so that we cannot say reversal is required on the ground of plain error, notwithstanding the absence of objection. *Ibid. Belton* governs here. A comparison of the instant charge, set out in the appendix, with the *Belton* charge clearly indicates that the former was not as "skimpy" as the latter. And it did sufficiently set out that second degree murder is murder committed with malice but without purpose or intent to kill, or that it was murder committed with purpose and intent to kill but without premeditation and deliberation, as opposed to first degree murder, requiring commission with malice, with the purpose and intent to kill and after deliberation and premeditation. *Cf. Tucker* v. *United States*, 115 U.S. App. D.C. 250, 318

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[17] Those instructions were, in pertinent part:

> If you find that the government has failed to prove any one of the essential elements enumerated as to the first degree murder, then you will find the defendant not guilty as to first degree murder and in such event, you may have for your consideration the lesser included offense of second degree murder.
>
> Second degree murder is the unlawful killing of one person by another with malice aforethought.
>
> Murder in the second degree may be committed with or without any purpose to kill, that is, if it is accompanied by malice as I have defined malice to you in connection with the first degree murder count.
>
> The essential elements which the government must prove beyond a reasonable doubt in order for you to find this defendant guilty of second degree murder, if you reach the lesser included offense, are:
>
> 1. That the defendant inflicted a wound or wounds from which deceased died.
> 2. That the defendant acted with malice, as I have previously defined that term for you, when he wounded the deceased.
>
> So if you find that the government has failed to prove the purpose and the intent to kill or has failed to prove premeditation and deliberation, but has proved both the killing of the decedent by the defendant and malice, then you may find the defendant guilty of second degree murder (*Belton* Tr. 364-65).

F.2d 221 (1963); *Hansborough* v. *United States*, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962). See also Junior Bar Section, Bar Association of the District of Columbia, *Criminal Jury Instructions* 66-67 (1966). In fact, the trial judge emphasized the essential difference—the elements of deliberation and premeditation—several times. See *Hansborough*, *supra* at ——, 318 F.2d at 223. For these reasons, the charge given does not call for reversal.[18]

IV. This Court need not consider appellant's claim, raised for the first time here, that the identification by two witnesses of appellant took place under circumstances so suggestive as to preclude admission of their testimony on due process grounds. In any event, the "confrontations" here did not result in a denial of due process.

(Tr. 40, 78-79, 95-96, 98-99, 106-07, 117, 119-20)

A. Appellant's constitutional claim need not be considered here.

In *Wright* v. *United States*, D.C. Cir. No. 20,153, decided January 31, 1968 this Court considered itself "uninhibited by the requirement that issues proffered on appeal must normally be raised in the trial court", *Id.* at 6 n.22, because the due process issue there raised "enjoyed its first successful invocation in federal litigation [in *Palmer* v. *Peyton*, 359 F.2d 199 (4th Cir. 1966) (*en banc*)] only after appellant's trial had been concluded, and in any event its added stature was not bestowed by *Stovall*[19] until

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[18] Appellant somewhat half-heartedly suggests that the trial court should have referred to appellant's consumption of half a bottle of wine. Trial counsel, who heard all the evidence as well as the trial court's comment that there was no evidence of intoxication, did not object to the absence of such any reference to intoxication. And even appellant agreed with the government's witnesses that he was not inebriated (Tr. 40, 119, 139).

[19] 388 U.S. 293 (1967).

this appeal was pending". *Wright, supra,* slip opinion at 6. But there is no reason here to undercut the time-honored principle that the preservation of constitutional rights on appeal requires reasonable objection to the production of evidence in court. *Segurola* v. *United States,* 275 U.S. 106, 112 (1927). See also *On Lee* v. *United States,* 343 U.S. 747, 749-50 n.3 (1952). This principle was reaffirmed in 1966 when the Supreme Court refused to pass on a constitutional objection going to the admissibility of evidence because there had been no objection at trial on the ground advanced on appeal. *Schmerber* v. *United States,* 384 U.S. 757, 765-66 n.9 (1966). See also *United States* v. *Indiviglio,* 352 F.2d 276 (6th Cir. 1965) *(en banc), cert. denied,* 383 U.S. 907 (1966). Here, trial began on August 21, 1967, long after *Palmer, supra,* and *Stovall, supra* had been decided. Moreover, *Wise* v. *United States,* —— U.S. App. D.C. ——, 383 F.2d 206 (1967) was decided three weeks before appellant's trial.[20] Thus, we submit that counsel had notice of this much discussed issue, and that his failure to ventilate it below precludes this belated attack here. See *Madden* v. *United States,* D.C. Cir. No. 20,874, *aff'd without opinion* November 28, 1967.

B. *In any event, the facts and circumstances here present did not amount to a denial of due process.*

Assuming *arguendo* that appellant could raise for the first time here his belated claim that he was denied due process, this Court should reject it. As in *Wise* v. *United States,* —— U.S. App. D.C. ——, 383 F.2d 206 (1967), the circumstances surrounding the confrontations of appellant by the witnesses Stephens and McNeil were not so unfair as to require exclusion of their testimony.[21] As

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[20] In fact, *Wise* may well be the reason that neither of appellant's two counsel sought to ventilate this issue below. See Part B of this argument.

[21] We use "confrontations" here only as a shorthand way of saying that the witnesses McNeil and Stephens saw appellant when he

noted there, "presentation of only one suspect, in the custody of the police, raises problems of suggestibility that bring us to the threshold of an issue of fairness." *Id.* at ——, 383 F.2d at 209. Here, as in *Wise*, the arrest and the confrontations were proximate to the scene and time of the offense.[22] The observers and actors were limited to those who had viewed the brutal backyard beating or both the beating and appellant's departure from Mrs. Southerland's apartment. As the Court pointed out "Here were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability, and are not inherently a denial of fairness" *Id.* at ——, 383 F.2d at 209. Moreover, they noted that "obtaining such nearby identification while the memory of the witness is fresh is plainly 'effective and intelligent law enforcement' " *Id.* at ——, 383 F.2d at 208.

Nor were other indications of unfairness present here. The confrontations here took place not in the suggestive atmosphere of a police station, but in front of or in the adjoining home of a neighbor to which Mrs. Southerland had fled. *Cf. Wright* v. *United States*, D.C. Cir. 20,153, decided January 31, 1968 (slip opinion at 10 n.2, Bazelon, C. J. dissenting). And even if it be said that the actions undertaken here were suggestive, *Stovall* v. *Denno*, 388 U.S. 293 (1967) does not condemn them if there were justifying circumstances. *Wright*, *supra* at 10 (Bazelon,

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was brought back by the police. As will appear shortly, we do not view the occurrences here as being within the ambit of that term as it has come to be used, except for the identification of appellant by Mrs. Southerland, the propriety of which appellant does not challenge (Br. 49).

[22] McNeil testified that he told the police which way appellant had gone, and that "a few minutes later" they brought him back (Tr. 79). Mrs. Stephens said as to the time when she saw appellant reenter Mrs. Southerland's apartment with the hammer until he was brought back. "I really don't know. The span of time wasn't long It wasn't that long" (Tr. 95, 96, 99). Officer Mosrie testified that after talking to Mrs. Southerland, he went to appellants house "just around the corner" and brought him back to Mrs. Bone's apartment (Tr. 117, 119-20). If these facts did not amount to hot pursuit, it is clear that they did not fall short of it by much.

C. J. dissenting). Here, was ample justification for the action of the police on the scene. Had they delayed in taking appellant back into the presence of Mrs. Southerland her confirmation that appellant was the man that had attacked her might have never been made, or at least delayed until the termination of a lengthy sojourn in the hospital. Even appellant admits that this confrontation was "imperative" (Br. 49).[23]

Appellant argues however that the protective umbrella of justification does not shelter the testimony of witnesses Stephens and McNeil. We submit that the recognition of the desirability of prompt identification under *Wise, supra* would negate appellant's contention in this regard if he were brought back so that he could be viewed by those witnesses. But we submit as well that the record supports the inference that the viewing of appellant by them was merely incidental to the necessity of bringing appellant before his victim. Mrs. Stephens went back inside until she heard sirens. Then she "went back out to the end of [her] yard and they were bringing the defendant back . . . (Tr. 98). She did not talk to him or to Mrs. Southerland, who was still in Mrs. Bone's apartment (Tr. 106-07). Although she was within 4 or 5 feet of appellant, she did not approach him (Tr. 107). Nothing in the record indicated that she had talked to the police or that they asked her to identify appellant. Mr. McNeil was apparently out in front of Mrs. Southerland's apartment

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[23] Moreover, her testimony could have exonerated appellant. *Cf. Kennedy* v. *United States*, 122 U.S. App. D.C. 291, 293, 353 F.2d 462, 464 (1965);

> [The police officer's] function is to try to minimize the incidence of erroneous detentions and charges; taking appellant into the presence of the complaining witnesses was entirely appropriate. Had the Officer not done this, appellant would have been subjected to continued detention, a trip to the station, to booking and lineup processes, unnecessarily if the complainant had said he was not one of the attackers. The police should not have overlooked the possibility of his exoneration, which could be easily and swiftly resolved by "quick verification in a confrontation".

(Tr. 78), and Officer Mosrie testified that when he returned with appellant, "[Mrs. Stephens and Mr. McNeil] were in front by this time, but they weren't inside" (Tr. 120). Nothing in the record indicated that Officer Mosrie asked either witness to identify appellant at that time. The government submits that this incidental viewing by the witnesses, not shown to have been the product of police activity, and not in the nature of a confrontation as such, is but another of the factors which indicate that appellant here was not denied due process of law. When it is also considered that McNeil observed appellant for four or five minutes and saw him again as he passed a few steps away on the sidewalk; and that Mrs. Stephens had an ample opportunity to observe appellant, even if the possibility of suggestion in and of itself adhered in some degree in this on-the-street situation, it seems most unlikely that these witnesses succumbed to it.

We submit that the circumstances surrounding these confrontations clearly do not cross the threshold separating fairness from unfairness, and that the identification testimony in this case was properly received.[24]

V. Neither statements made by the arresting officer nor statements made by the prosecutor in his closing argument require reversal under the circumstances of this case.

(Tr. 176-79, 182, 188, 210-11)

Appellant asserts that it was prejudicial for the officer executing the search warrant to testify that the hammer,

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[24] This Court's ruling in *Wright*, *supra* does not dictate that this case should be remanded for a new trial unless it be determined that the testimony as to these identifications were harmless beyond a reasonable doubt. The fairly clear record showing the freshness of the so-called confrontations, the necessitous circumstances, the reasonable nature of the police procedures undertaken, Mrs. Southerland's testimony that appellant was the man in her apartment, the fact that the witnesses' viewing of appellant took place outside the confines of a police state, and the quality of the initial viewings all militate against such a result.

clothing and other items recovered from appellant's apartment appeared to have blood on them to him, and that the prosecutor's statements (See Counterstatement p. 16) amounted to testimony and therefore was plain error.

The first branch of appellant's argument lacks merit. There was no objection below to the police officer's testimony when it was given, and appellant should not now be heard to question it here. See, *e.g.*, *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) *(en banc)*, *cert. denied*, 383 U.S. 907 (1966).

But even if the issue were to be considered, given all the circumstances, the police officer's description of appellant's appearance[25] and the appearance of the items recovered were proper. That the government did not produce evidence of analysis of the blood which the officer testified to were matters for the jury's consideration in determining the weight to be given to his testimony. See, *e.g.*, *Wood* v. *United States*, 361 F.2d 802 (8th Cir.), *cert. denied*, 385 U.S. 978 (1966); *People* v. *Preston*, 341 Ill. 407, 173 N.E. 383 (1930); but *cf. United States* v. *Slaughter*, 366 F.2d 833 (4th Cir. 1966). Appellant's counsel brought the matter forcefully to the attention of the jury by arguing that the items had no discernible blood on them (Tr. 176-79),[26] and the jury presumably had those items before it since the items were admitted in evidence without objection.[27] Under these circum-

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[25] The officer testified that appellant appeared to have little flecks of blood on his chin (Tr. 119). Not only was this statement unchallenged below, it is unchallenged here.

[26] In fact, defense counsel erroneously referred to Mr. McNeil's testimony as establishing that he saw a "man with blood smeared on his face" and that he met "what apparently, according to the testimony, was a madman, blood dripping, walking down the street" (Tr. 172-73; see also Tr. 182).

[27] Defense counsel asked that the court advise the jury that they were entitled to ask for any items in evidence. The court so advised the jury (Tr. 210-11). During his summation, defense counsel asked the jury to "feel free to look at the pieces of clothing" (Tr. 178).

stances, the officer's description can hardly have amounted to plain error, especially in view of appellant's testimony placing himself at the scene of crime; Mrs. Southerland's testimony that appellant was the only other person in her house when she was beaten, and the convincing identification testimony of the witnesses McNeil and Stephens. It was this testimony, not the existence or non-existence of blood on the items recovered, which formed the foundation for appellant's conviction.

The second branch of appellant's argument also lacks merit. Lead defense counsel, who showed himself to be a persuasive and effective advocate during the entire course of the proceedings, did not object to any of the government's summation. But "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940). Accordingly, appellate courts ordinarily refuse to entertain challenge to the propriety of a summation raised for the first time on appeal. *Karikas* v. *United States*, 111 U.S. App. D.C. 312, 296 F.2d 434 (1961); see also *Accardo* v. *United States*, 102 U.S. App. D.C. 4, 249 F.2d 519 (1957), *cert. denied*, 356 U.S. 943 (1958). As neither of appellant's two trial counsel were alarmed by the nature of the government's summation below, we think appellant ought not be heard to complain here.

Appellant challenges two statements made by the government in summation. Countering defense counsel's statement that he could see no blood on the items in evidence, the prosecutor said:

> He talks about fingerprints on the wall and that he can't see blood on the clothing. Of course, you can't see it a year and a half later. Don't forget, when Officer Mosrie recovered those items, it was the next day . . . But a year and a half later, counsel argues to you that he can't see any blood on the clothing (Tr. 187-88).

Appellate counsel equates this to a statement that blood disappears after a year and a half (Br. 36). We submit, however, that in the context of the arguments of both parties, the jury could hardly have taken this statement either literally or as appellant now interprets it. Instead, in the light of their own experiences, the statement most likely was understood to mean that the passage of time would cause a transformation in the appearance of the blood, if any, since the time Officer Mosrie had an opportunity to view it. Even if the statement can be magnified into error as appellant suggests, substantial prejudice must also be found. *Cross* v. *United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965). The second paragraph succeeding after the challenged statement made it clear that the question of the blood on the items should be viewed by the jury as a minor part of the case (Tr. 188). Defense counsel had already put before the jury the proposition that blood was not discernible on the items recovered. The government's evidence was far from being paper-thin, and the trial judge carefully instructed the jury that they were

> . . . the sole judges of the issues of fact in this case. And you base that judgment solely upon the evidence which you have heard in this courtroom during . . . the trial consisting of the testimony of the witnesses, the exhibits which were received in evidence, and the inferences reasonably deducible from the testimony of the witnesses and the exhibits (Tr. 119).

He then reiterated:

> I said to you to base your verdict on the evidence. That includes the testimony of the witnesses, the exhibits and the inferences. We have had the benefit of statements of counsel. Their statements are not evidence. As they very candidly said, one or probably both, if their recollection of the evidence is not the same as yours, it is your recollection that is controlling.
>
> They have given you the benefit of their recollection of the evidence and their interpretation of the

> evidence. But it is your recollection, your interpretation, that must be controlling with you in the performance of your duty as the judges of the issues of fact in this case. . . .

And later he reminded them "I can't help you on the facts and your recollection of the evidence that is controlling" (Tr. 210). We submit that this combination of factors sufficiently removed the statement, if error, from the realm of reversible error. *Cf. Cross, supra.*[28]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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WILLIAM H. COLLINS, JR.,
ALBERT W. OVERBY, JR.,
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[28] These considerations apply with at least equal force to the government's statement with reference to the fingerprints. The government did not rely on the bloody handprint as proof of appellant's presence or of his state of mind. As pointed out by appellant, trial counsel below asserted that the handprint was never tied to appellant. Only one witness testified as to the handprint below, in the context of a general description of the bloody condition of Mrs. Southerland's apartment. We submit that the government's statement about the print had little, if any impact on an already well-cautioned jury's assessment of all the facts.

APPENDIX A

Ladies and gentlemen of the jury, the case which I am submitting to you for your determination this morning is that of the United States of America against James Hemphill, who was named in a two-count indictment, the first count charging the crime of first degree murder, and the second count charging assault with a dangerous weapon . . . .

It is my responsibility as the judge, at this stage, to charge you on the principles of law that apply. It is your duty as jurors to accept the law as I give it to you. On the other hand, you are the sole judges of the issues of fact in this case. And you base that judgment solely upon the evidence which you have heard in this courtroom during the course of the trial consisting of the testimony of the witnesses, the exhibits which were received in evidence, and the inferences reasonably deducible from the testimony of the witnesses and the exhibits . . . .

I said to you to base your verdict on the evidence. That includes the testimony of the witnesses, the exhibits and the inferences. We have had the benefit of statements of counsel. Their statements are not evidence. As they very candidly said, one or probably both, if their recollection of the evidence is not the same as yours, it is your recollection that is controlling.

They have given you the benefit of their recollection of the evidence and their interpretation of the evidence. But it is your recollection, your interpretation, that must be controlling with you in the performance of your duty as the judges of the issues of fact in this case . . . .

[The first count of this indictment] charges the crime of first degree murder which is the killing of a human being purposely and with deliberate and premeditated malice. The essential elements of murder in the first degree as applicable to this particular case are these:

First, that the defendant inflicted a wound or wounds from which the deceased died. Second, that

the defendant had the purpose or intent to kill the deceased. Third, that the defendant acted with malice. Fourth, that the defendant acted with premeditation and deliberation . . . .

As to the fourth element of first degree murder, that the defendant acted with premeditation and deliberation, premeditation is the formation of the intent or plan to kill, the formation of a positive design to kill.

Deliberation means further thought upon this plan or design to kill. It must have been considered by him, the defendant.

It is your duty to determine from the facts and circumstances of this case that you may find surrounding this killing, whether reflection and circumstances amounting to deliberation occurred.

If so, even though it be of exceedingly brief duration, that is sufficient because it is the fact of deliberation rather than the length of time that is important. Although some appreciable period of time must have elapsed during which the defendant deliberated in order for this element to be established, no particular length of time is necessary for deliberation.

It is for you, the jury, to determine if the time was sufficient to permit premeditation and deliberation . . . .

If you find the Government has not proved beyond a reasonable doubt each of the essential elements of first degree murder, you may then consider whether the Government has proved beyond a reasonable doubt the essential elements of murder in the second degree which is what we refer to as a lesser included offense.

Murder in the second degree differs from murder in the first degree in that it may be committed without purpose or intent to kill or it may be committed with purpose or intent to kill but without premeditation and deliberation.

A killing under the influence of passion induced by insufficient provocation may be murder in the second degree. An accidental or unintentional killing con-

stitutes murder in the second degree if it is accompanied by malice.

Consequently, if you find the defendant killed the deceased with malice, bearing in mind the definition of malice which I have given you that it is a general state of mind of the kind that I have defined, and that he did so without purpose or intent to kill or it committed with purpose or intent to kill then without premeditation and deliberation, you may find the defendant guilty of murder in the second degree.

Even if there is a reasonable doubt in your minds as to whether there was a purpose and intent to kill, or whether there was any premeditation or deliberation, you may find the defendant guilty of murder in the second degree rather than murder in the first degree.

Let me summarize the difference between murder in the first degree and murder in the second degree. Murder in the first degree is a murder committed with malice with the purpose and intent to kill and after deliberation and premeditation.

Murder in the second degree is murder committed with malice but without purpose or intent to kill or with purpose and intent to kill then without premeditation and deliberation. If there is no purpose or intent to kill or if there is a purpose and intent to kill but no premeditation or deliberation, then the unlawful killing, if committed with malice, constitutes murder in the second degree rather than murder in the first degree.

If you find the Government has proved beyond a reasonable doubt each of the essential elements of murder in the second degree and you find the Government has failed to prove each of the essential elements of murder in the first degree, then you may find him guilty of murder in the second degree.

On the other hand, if you find the Government has failed to prove any one of the essential elements of murder in the second degree, you may not find him guilty of murder in the second degree.

If you find the Government has failed to prove each of the essential elements of murder in the first degree and has also failed to prove each of the essential elements of murder in the second degree, then you must find the defendant not guilty under the first count of the indictment. (Tr. 190-93, 200, 203-06).[29]

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[29] Just before the jury retired, the trial judge reminded them:

> I can't help you on the fact because it is your recollection of the facts and your recollection of the evidence that is controlling (Tr. 210).

He also told them:

> If, in the course of your deliberations, you should want any or all of the exhibits, you may send for them and I will see that you get them (Tr. 211).

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